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Cook Inlet Tug & Barge, Inc. and Inlandboatmen's Union of the Pacific, Petitioner. Case 19–RC–106498

June 30, 2015

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On January 23, 2014, the National Labor Relations Board granted in part the Employer's Request for Review of the Regional Director's Decision and Direction of Election, as it raised a substantial issue with respect to whether the Employer's captains are supervisors within the meaning of Section 2(11) based on their purported authority to assign and responsibly direct employees.¹

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully examined the entire record with respect to the issue on review, including the briefs on review, the Board has decided to affirm the Regional Director's finding that the captains do not possess the asserted authority and therefore are not supervisors, both for the reasons stated in his decision and those that follow.

The relevant facts are set forth in the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix). Also, where relevant, we have noted additional facts and testimony not specifically addressed in the Decision and Direction of Election.

1. *Assignment*: In agreeing with the Regional Director that the captains do not exercise supervisory assignment authority with respect to the deckhands, we rely mainly on undisputed evidence—the testimony of Captain Daniel Butts and Chief Operating Officer (COO) Steve Scalzo—that each of the Employer's vessels typically has only one deckhand assigned to it. In *Oakwood Healthcare*, 348 NLRB 686, 693 (2006), the Board held that assignment authority does not confer supervisory status if there is “only one obvious and self-evident choice.” Such an assignment does not involve the exercise of independent judgment.² This alone precludes a

finding that the captains exercise supervisory assignment authority. But even aside from this fact, we find that the Employer has not met its evidentiary burden.

First, much of the evidence that the Employer asserts demonstrates the captains' authority to assign—such as telling deckhands to close hatches, bring in winches, and have relevant equipment ready for use—constitutes ad hoc instruction to perform discrete tasks, not assignment in the statutory sense.³ And, as the testimony that captains play to individual deckhands' strengths is vague and/or entirely hypothetical, the Employer has failed to establish that the instruction is anything more than “routine,” i.e., it does not involve the exercise of independent judgment. See, e.g., *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 22 (2014) (citing *KGW-TV*, 329 NLRB 378, 381–382 (1999)); *Clark Machine Corp.*, 308 NLRB 555, 555–556 (1992).

Second, and contrary to the Employer's argument, there is no evidence that captains are involved in setting the work schedules of deckhands. Higher management performs this function, assigning both captains and deckhands to an alternating schedule of 1 week on, 1 week off. Once this schedule is set, there is no evidence that captains can require deckhands to deviate from it. Deckhands may switch workweeks with each other, and there are no examples of captains vetoing such changes. Although captains appear to determine the specific hours the crew will work during the weeks they are on the boat, the evidence about this practice is not sufficient to establish that captains use independent judgment in doing so.⁴ Despite generalized testimony that captains determine work hours based on water and weather conditions, the tasks assigned to the vessel, and the Coast Guard's regulations restricting crew work hours, the record indicates that a crew and vessel usually performs one ship assist per day, and the Employer's office tells captains when that task needs to be done. It appears that captains simply arrange work hours around those tasks. With no further testimony about how captains determine work hours, the Employer has not established that scheduling is more

engineer on vessel because he was the “only [and] obvious choice” for the assignment).

Although there is evidence that, on a few occasions, a captain determines that more than one deckhand is needed for a job, as discussed, infra, on these occasions General Manager Brad Kroon is effectively involved in selecting the additional deckhand, and the selection is based on who is available.

³ See *Brusco Tug & Barge*, supra, slip op. at 5–6; *Oakwood Healthcare*, 348 NLRB at 689; see also *Frenchtown Acquisition v. NLRB*, 683 F.3d 298, 311–312 (6th Cir. 2012).

⁴ See *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (party asserting that putative supervisors possess authority to assign must adduce “concrete evidence showing how assignment decisions are made”).

¹ Review was denied as to whether the captains possess the authority to hire, discharge, promote, discipline, and adjust grievances.

² See also *Brusco Tug & Barge, Inc.*, 359 NLRB No. 43, slip op. at 6 (2012), incorporated by reference at 362 NLRB No. 28 (2015) (no independent judgment involved in assigning overtime work to lone

than routine. And with respect specifically to the captains' ability to determine when to start a ship assist due to weather and water conditions (or to decline a job for safety reasons), there are no examples of a captain actually adjusting start times based on such conditions, or declining a job for safety reasons, so here too there is no evidence establishing that these scheduling matters are other than routine.⁵ Finally, and contrary to the Employer's argument, it is not apparent to us how adhering to Coast Guard regulations—which, for example, provide that a crew can work only 12 hours in a 24-hour period—involves the exercise of independent judgment.

Third, although all three witnesses testified that captains choose which deckhands work on their vessel in certain situations (i.e., to replace the regular deckhand on a permanent basis, to replace an absent regular deckhand on a temporary basis, and when a captain decides a job needs more than one deckhand), the record contains only one such example, and it fails to establish assignment authority in the statutory sense. Thus, General Manager Brad Kroon testified that after a particular deckhand quit, he presented the ship's captain with a list of available "floaters" from whom he could choose a replacement. Kroon, however, did not explain what criteria the captain considered in making this decision. Captain Butts and COO Scalzo testified in general terms about occasions where captains have contacted the Employer's office seeking a temporary replacement deckhand. Butts, however, further testified that in these situations, selection of a replacement is based on availability;⁶ in addition, the role that the Employer's office plays in finding a temporary replacement indicates that the captains' judgment in such matters is not free of the control of others. The only other testimony bearing on the factors that a captain considers in selecting a deckhand was whether the individual had been "approved," "trained," or "mentored," in other words, whether the deckhand was capable of doing the job. But basing an assignment on whether an individual is capable of performing the job does not involve independent judgment. *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (temporary work assignments "dictated largely by what work the replacement is capable of performing" do not establish authority to assign).⁷

⁵ In addition, there is testimony indicating that the Employer's operations manager helps ensure that jobs and start times are "doable," so it appears that captains do not adjust start times "free of the control of others." *Oakwood Healthcare*, 348 NLRB at 692–693.

⁶ See *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010) (assignment based on availability does not require independent judgment).

⁷ With respect to situations where a captain determines to utilize an additional deckhand, the Employer points to testimony that captains consider the type of job, what is needed to ensure safe passage, and (unspecified) regulatory guidance. Employer witnesses also testified

In sum, the evidence presented by the Employer was hypothetical and lacking in specificity, and thus did not satisfy the Employer's burden of demonstrating that captains exercise assignment authority in the statutory sense. And, to the extent that they exercise any such authority, there is no evidence that it involves the exercise of independent judgment.⁸ We therefore affirm the Regional Director's finding that the captains do not assign within the meaning of Section 2(11).⁹

2. *Direction*: We agree with the Regional Director that the captains direct deckhands to perform particular tasks, but we also agree that the Employer failed to establish that the captains are accountable within the meaning of *Oakwood Healthcare*. 348 NLRB at 691–692 (the statutory requirement of "responsibl[e]" direction is not met unless the putative supervisor is held accountable).¹⁰

that "tricky" jobs and "circumstances" may require extra deckhands. The Employer, however, gave no indication how often such a determination is made, and the foregoing loosely defined considerations do not demonstrate the use of independent judgment in making that determination. See *Lynwood Manor*, 350 NLRB 489, 490 (2007) (independent judgment not shown by testimony that nurses determined staffing needs based on patient acuity and prior reports, as such testimony did not establish that nurses made assignments based on patient conditions/needs, particular nursing skill sets, or an assessment of the likely amount of time needed to attend to each patient) (citing *Oakwood Healthcare*, 348 NLRB at 697). COO Scalzo testified generally that longer-range jobs may require larger crews, but he did not explain how often longer-range jobs occur or how often they actually require a larger crew.

⁸ The Employer contends that the Regional Director relied too heavily on the ratio of captains to deckhands as a ground for not finding supervisory status. As stated above, however, the Regional Director simply observed, consistent with the evidence, that a captain usually works with only a single deckhand, and therefore exercises little or no independent judgment in assigning that deckhand to perform tasks. See *Brusco Tug & Barge*, supra, slip op. at 6. The cases the Employer cites, concerning whether a Regional Director may consider the ratio of supervisors to employees that results from a particular determination of supervisory status, are inapposite. See *NLRB v. Prime Energy Ltd. Partnership*, 224 F.3d 206, 211 (3d Cir. 2000) (citing *NLRB v. Atleboro Associates*, 176 F.3d 154, 163 fn. 5 (3d Cir. 1999)).

⁹ We also find that the Employer has not established that captains exercise independent judgment in assigning employees in emergency and drill situations. A station bill (contained in the Employer's Responsible Carrier Program manual) states that deckhands should "report to the captain assist as directed" in emergency situations. But the record contains no examples of a captain making assignments in emergency situations and no indication of what they would consider in such situations. For his part, Captain Butts simply testified that in an emergency he would consult the station bill and "direct the crew accordingly." That testimony fails to illustrate the exercise of independent judgment. Furthermore, to the extent that giving out tasks in emergency situations should be treated as evidence of direction, there is, as discussed below, no evidence establishing that captains are held accountable within the meaning of *Oakwood Healthcare*, at 691–692.

¹⁰ In *Oakwood Healthcare*, supra at 692, the Board stated:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor

Although the Employer's witnesses testified that captains have "full authority" on their vessels, are the "ultimate decisionmaker[s]," and that safety decisions are "totally up to" the captains, none of those statements supports a finding that the captains are accountable as the Board defines that term.¹¹ The Employer offered no specific examples or, indeed, any evidence illustrating that captains are held accountable with respect to deckhand conduct or performance. Captain Butts stated he was unaware of this ever happening, and although he referred to a written policy holding captains accountable for deckhand performance, this policy is not in the record.¹² And even the generalized and hypothetical testimony the witnesses offered indicated that captains are held accountable for their own actions rather than those of the crew.

Regarding the testimony that captains are "responsible" under Coast Guard regulations, questions of supervisory status under the Act "cannot be answered merely by the assertion of maritime law."¹³ In the present case, the Employer's references to Coast Guard regulations are insufficient to meet its burden because (1) the Employer has neither introduced the regulations it seeks to rely on nor offered any citation to the relevant regulations; (2) none of the testimony about the regulations indicates how captains are held accountable, as we use the term, under the regulations; and (3) even if the Coast Guard holds captains accountable, it does not follow that the Employer holds them accountable, and supervisory authority must be exercised "in the interest of the employer" under Section 2(11).¹⁴

the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Because we agree with the Regional Director that the Employer has not shown that the captains exercise responsible direction, it is unnecessary to pass on the Regional Director's additional finding that the captains do not direct deckhands using independent judgment.

¹¹ See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (discussing how accountability may be proved); see also *Pantex Towing Corp.*, 258 NLRB 837, 842 (1981) (responsibility for crew safety does not establish supervisory authority within the meaning of the Act).

¹² There was also testimony that captains can be disciplined for failing to maintain their vessels, but it was not shown that the captains are held responsible for the failings of deckhands as opposed to their own. In any event, responsibility for maintenance of the vessel does not establish supervisory status because maintenance of physical property is not a supervisory function. See *Graham Transportation Co.*, 124 NLRB 960, 962 (1959) (responsibility for maintenance of physical property does not, by itself, establish supervisory authority).

¹³ *Brusco Tug and Barge*, supra, slip op. at 8; *McAllister Bros.*, 278 NLRB 601, 614 (1986), enf'd. 819 F.2d 439 (4th Cir. 1987) (captains' legal "responsibility" under Coast Guard regulations "does not confer supervisory status under the Act").

¹⁴ The Employer points out that the captains train the deckhands, but training is not one of the Sec. 2(11) criteria. See *Sears, Roebuck & Co.*,

The Employer's remaining arguments are adequately addressed in the Regional Director's decision. We accordingly affirm his finding that the Employer has not established that its captains possess the authority to responsibly direct within the meaning of Section 2(11).

ORDER

IT IS ORDERED that the Regional Director's Decision and Direction of Election is affirmed, and that this matter is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. June 30, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Unlike my colleagues, I believe the record supports a finding that the Employer's tugboat captains are supervisors under Section 2(11) because they have authority to assign and to responsibly direct deckhands.¹ I would reverse the Regional Director's findings to the contrary, in large part because the record consists entirely of evidence regarding supervisory authority that is uncontroverted.² My colleagues and the Regional Director dis-

292 NLRB 753, 754 (1989), and cases cited. Finally, and contrary to the Employer, the Regional Director did not err in citing *Chevron Shipping Co.*, 317 NLRB 379, 382 (1995). To the extent the Regional Director even applied *Chevron Shipping* in his analysis, his otherwise thorough discussion makes clear that he did not categorically exclude captains from supervisory status based on their use of technical or professional judgment. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 714-722 (2001).

¹ The Board granted review only as to these two potential indicia of supervisory authority, so I confine my analysis to these two issues, although I dissented from the Board's failure to grant review as to five other potential bases for supervisory status (authority to hire, discharge, promote, discipline, and adjust grievances). See *Cook Inlet Tug & Barge, Inc.*, Case 19-RC-106498, 2014 WL 265834 (Jan. 23, 2014).

² The only testimony in the record was provided by three employer witnesses: General Manager Brad Kroon (also a licensed captain who has worked in that capacity), President and Chief Operating Officer Steve Scalzo, and Captain Daniel Butts. The Employer also introduced corroborating documentary evidence, including its Responsible Carrier Program (subtitled, "General Guidance and Overview of Policies & Procedures"), its employee handbook, and a Coast Guard letter summarizing work-hour limitations and watch keeping. The witnesses also described in testimony Coast Guard regulations considered by the

count or disregard this evidence, which supports a finding of supervisory status, because in their view the testimony could have been stronger. However, the purpose of an “appropriate hearing” in representation cases is to permit the Board to make findings that are consistent with record evidence.³ In my partial dissenting opinion in *Pacific Lutheran University*,⁴ I stated it was inappropriate for the Board to discount relevant documentary evidence by labeling it “mere paper authority,” or to disregard un rebutted testimony by characterizing it as “self-serving.” Here, my colleagues similarly err by dismissing un rebutted testimony establishing supervisory status merely because it could have been more detailed or supported by more specific examples.⁵

To establish that the captains are statutory supervisors, the Employer must show by a preponderance of evidence that (1) captains hold the authority to engage in any one of the supervisory functions enumerated in Section 2(11) (which include the authority to “assign” and “responsibly to direct”), (2) their exercise of such authority was not routine or clerical, but required independent judgment, and (3) their authority was held in the interest of the employer. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Section 2(11) requires only possession of authority to carry out a supervisory function, not its actual exercise. E.g., *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). To “assign” means to designate an employee to a place, appoint an employee to a time, or give an employee significant overall duties; to “direct” means to give employees ad hoc instructions or tasks, and to do so “responsibly” means to be “accountable for the performance of the task by the other.” *Id.* at 689, 692. Here, uncontroverted testimony supports a finding that captains possess the authority to assign deckhands and exercise independent judgment in doing so,⁶ and that they also possess the authority to responsibly direct deckhands exercising independent judgment.⁷

courts in other cases involving tugboats and other vessels. See, e.g., *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484 (2d Cir. 1997).

³ Sec. 9(c)(1).

⁴ 361 NLRB No. 157, slip op. at 27 (2014) (Member Miscimarra, concurring in part and dissenting in part).

⁵ I agree that the Board has encountered stronger evidence regarding some aspects of supervisory status than was presented in this case. But the fact that some cases are closer than others does not eliminate the Board’s responsibility to draw conclusions based on the record evidence. Sec. 10(c) and (e). As the Supreme Court stated in *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 674 (1961), “[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task.”

⁶ Captains determine the specific hours deckhands work based on their independent evaluation of tides and other water and weather conditions, which change rapidly in the winter. They possess authority to veto schedule adjustments or swaps that deckhands arrange among

themselves, and will do so if they need a deckhand with particular skills to perform a particular job. Captains consider whether particular deckhands have been approved, trained, mentored, and are capable of performing the job, which Captain Butts testified is determined in “his discretion.” If a captain needs a deckhand “with strong engine room capabilities,” he possesses the authority to “switch them around”—i.e., reassign a deckhand from one vessel to another. Captains determine whether a larger crew is required for a particular job, based on their independent evaluation of whether a job will be “tricky” (testimony of Captain Butts) and “depending on the circumstances” (testimony of President Scalzo). Depending on weather or water conditions and the nature of the job, captains may independently decide, for safety reasons, to use two vessels to complete a job or to start a job early, which necessarily affects the times and places to which deckhands are assigned. Captains decide whether to grant or deny deckhand requests for time off. Captains possess unreviewable authority to decide not to perform a particular job if they think conditions are too dangerous, and they can assign deckhands to maintenance duty in such instances. The record establishes that captains cannot be overruled if they decide that a particular job should not be performed. Although many of the Employer’s jobs involve only one deckhand, I disagree with my colleagues that this precludes a finding that captains exercise independent judgment in assigning deckhands. See *Brusco Tug & Barge, Inc.*, 362 NLRB No. 28, slip op. at 3 (Member Johnson, dissenting) (criticizing “erroneous suggestion that independent judgment in assigning work is limited to deciding which of multiple employees to assign to a job by comparing their abilities”). Besides, some jobs require more than one deckhand, and captains independently determine when that is the case.

⁷ Captains direct employees to perform a multitude of tasks, such as bringing in the winch, lengthening or shortening the tow wire, opening and closing hatches, tying lines, and getting equipment ready. Captains indisputably exercise independent judgment in directing the performance of these tasks, since in doing so they must take into consideration a variety of factors, such as ice, tides, and vessel maneuvers the captain himself plans and executes. All three witnesses testified uniformly, and without contradiction, that the captain may be held accountable for problems or mistakes caused by crew members. General Manager Kroon testified that the captain would be held accountable if the vessel’s gear was not in working order. President Scalzo testified that the captain was accountable for maintenance performed by the crew and could face discipline or termination for an accident. Captain Butts testified that he is the “end-all, be-all” on the boat, and that “if my crew isn’t performing and I’m directing that crew then I’m not doing my duty and I’m negligent, which is a fireable offense.” He also testified that the “essence” of being a captain is the fact that captains may be disciplined or discharged based on deficient deckhand performance, and that, under Coast Guard requirements, if the crew spilled fuel into the water, for example, the captain could face a reprimand, fines, or even jail time. Moreover, documentary evidence indicates that captains are “ultimately responsible for the safety of the vessel, passengers and crew, cargo, and environment” (Emp. Exh. 3), which necessarily depends in part on how deckhands carry out their directed tasks. Finally, the record reveals that certain jobs require two tugboats, and in these instances one captain takes the lead and calls out orders to the other captain. Even if such orders do not constitute *immediate* direction of an employee (since both captains are statutory supervisors), they result in direction of the subordinate captain’s crew. A finding of supervisory status for the “lead” captain is all the more compelling, since he is responsible for directing his or her own crew (immediately) plus the crew of another tugboat (through the other captain).

My colleagues find the record insufficient to establish that captains “responsibly” direct deckhands because they require evidence that captains are held directly accountable for the actions of their crew. I believe the record contains such evidence. Again, Captain Butts testi-

Additionally, I believe a finding against supervisory status fails to give appropriate consideration to the nature of the operations here. The Employer's tugboats are used for "ship assist" and "project" work in Alaskan waters—work that frequently involves hazardous conditions⁸ and substantial variation from job to job. My colleagues' finding produces an outcome in which *nobody* on the Employer's vessels exercises supervisory authority, contrary to the record evidence and applicable Coast Guard requirements that make captains ultimately accountable for everything that happens on board.⁹ Accordingly, I respectfully dissent.

Dated, Washington, D.C. June 30, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

....

fied that the "essence" of being a captain is the fact that captains may be disciplined or discharged based on deficient deckhand performance. I disagree, however, with my colleagues' definition of "accountability," which is so narrow as to virtually write responsible direction out of the Act. In my view, individuals are accountable for Sec. 2(11) purposes where they face consequences based on their "own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work." *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 2 (2014) (Member Miscimarra, concurring in part and dissenting in part) (quoting *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 9 (2011) (Member Hayes, dissenting)). The evidence recounted above abundantly demonstrates the captains' accountability for their oversight and direction of deckhands in the safe and successful execution of potentially high-risk operations.

⁸ Such work includes escorting tankers, which carries a risk of catastrophic environmental consequences, such as when the Exxon Valdez spilled 11 to 38 million gallons of crude oil into Prince William Sound.

⁹ I do not believe the Board must invariably find that someone is a statutory supervisor when work is being performed. I do believe, however, that where supervisory status is at issue, the Board must take into account (i) the nature of the employer's operations; (ii) the work performed by undisputed statutory employees; and (iii) whether, based on the foregoing, it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute. Here, the Employer's operations involve tugboats operating in Alaskan waters and performing "ship assist" and "project" work; the work performed by deckhands—whether assigned maintenance or directed tasks—affects the safety of the vessel, its passengers and crew, its cargo, and the environment; and it is wholly implausible to conclude that all supervisory authority is vested in individuals on shore and not also in the captains, who are in charge of the vessel, who assign and direct deckhands and exercise independent judgment in doing so, and who face discipline or discharge if the deckhands they direct perform deficiently.

DECISION AND DIRECTION OF ELECTION

The above-captioned matter is before the National Labor Relations Board (the Board) upon a petition duly filed under Section 9(c) of the National Labor Relations Act (the Act), as amended. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings and conclusions.²

I. SUMMARY

The Employer is a tugboat and barge company that operates tugboats, barges, and crew passenger boats primarily in and around the Cook Inlet region in Alaska. The Employer currently employs about six deckhands, six captains, an office staff, and management at its operations in Anchorage and Seward, Alaska. One of the Employer's captains and at least one of its deckhands are based in Seward. All other captains and deckhands are based in Anchorage.

Petitioner filed the instant petition initially seeking to represent all deckhands and employees employed by the Employer. However, at the outset of the hearing, Petitioner amended the petition to seek a unit of all the Employer's deckhands and captains. Then, in its post-hearing brief, Petitioner essentially sought to limit the scope of the unit by excluding captains and deckhands employed by the Employer out of its Seward operations, i.e., the unit sought was limited to captains and deckhands employed by the Employer in Anchorage. However, following the close of the hearing, the parties entered into a joint stipulation to open the record for the limited purpose of agreeing that Petitioner seeks a unit composed of deckhands and captains working in the Employer's operations in Anchorage as well as in Seward. In conjunction with the stipulation, Petitioner submitted a letter to me requesting to withdraw portions of its posthearing brief seeking to limit the scope of the unit only to the Employer's operations in Anchorage.

In light of the foregoing, I hereby permit the reopening

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. It is noted in particular that the hearing officer's decision not to allow evidence concerning alleged supervisory taint of the petition in this matter is affirmed, as the Board has found it inappropriate to litigate such matters in representation proceedings. *Lampcraft Industries*, 127 NLRB 92 (1960); *John Liber & Co.*, 123 NLRB 1174 (1959); *Bi-States Co.*, 117 NLRB 86 (1957). The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of §9(c)(1) and §2(6) and (7) of the Act.

of the record to receive the parties' joint posthearing stipulation and approve the parties' stipulation, that the appropriate scope of the unit includes the Employer's operations in Anchorage and Seward, Alaska.

In short, the primary issue in this proceeding is whether the captains should be excluded from the petitioned-for unit because they possess indicia of supervisory authority as defined in Section 2(11) of the Act. The Employer argues the captains are supervisors while Petitioner argues the captains are not supervisors within the meaning of the Act.

I have carefully reviewed and considered the record evidence and the arguments made by the parties both at the hearing and in their posthearing briefs.³ I find that the Employer has not met its burden of establishing that captains are supervisors as defined by Section 2(11) of the Act. Accordingly, I shall direct an election in a unit including all deckhands and captains employed by the Employer in its Anchorage and Seward, Alaska operations.

Below, I have set forth the record evidence relating to the Employer's operations, its managerial hierarchy, and the captains' duties and responsibilities concerning their purported possession of supervisory indicia; an analysis of the Board's standards for determining supervisory status, as applied to the record evidence, and my conclusions in that regard; and the details of the directed election and the procedures for requesting review of this decision.

II. RECORD EVIDENCE⁴

A. The Employer's Operations

The Employer, a tugboat and barge company, operates tugboats, barges, and crew passenger boats primarily in and around the Cook Inlet region in Alaska. The Employer performs its services in areas including the waters ranging from Cook Inlet and the Kenai Peninsula, to Kodiak and Prince William Sound, including the waters around the cities of Anchorage, Homer, Kodiak, Seward, Whittier, and Valdez.

The Employer's business was previously owned by a local family for three generations. In 2011, Foss Marine Holdings (Foss), a holding company that operates six to eight tug and barge companies in the United States and internationally, acquired the Employer through an asset purchase. At the time of the acquisition, the Employer owned two tractor tugs, one push tug, and one barge and

employed seven or eight deckhands and captains. The Employer subsequently acquired an additional tractor tug, an additional barge, and two crew passenger boats, and has increased the number of deckhands and captains it employs. The record does not reflect whether the Employer's policies and procedures, the responsibilities of its captains and deckhands, or whether its local management staff changed at the time of the Foss acquisition.

In December 2012, the Employer purchased Anderson Tug and Barge Company (Anderson), a company operating out of Seward. Although he testified that he did not know the correct legal term to describe the relationship between the Employer and Anderson, Employer president and Foss chief operating officer (COO) Steve Scalzo testified that Anderson is owned by the Employer, that it is a "separate organizational group out of Seward," and that it is a subdivision of the Employer. Scalzo further testified that Anderson is not a subsidiary of the Employer. Employer's Counsel stated on the record that it was a "merged operation," but did not elicit testimony to that effect from any witness. Currently, one captain and at least one deckhand operate out of Seward. The remaining five captains and five deckhands operate out of Anchorage. The Employer's need for deckhands and captains varies seasonally, with the Employer employing fewer than 10 deckhands and captains during the winter months, and as many as 20 deckhands and captains during the summer months.

The Employer's work is evenly split between two types. The first type is project work, which consists of assisting ships, barges, dredges, and other vessels to safely maneuver in and out of areas such as ports. The Employer's ship assist work is primarily performed in the Anchorage Harbor area, with some being performed further south in the areas surrounding the Kenai Peninsula. Typically, for ship assist work, one captain and one deckhand, or potentially two deckhands, man a vessel.

The second type, project work, consists of providing construction support using the Employer's vessels. For example, the Employer has used a tugboat in combination with a barge to load construction materials and crews, transport them, safely land (sometimes by beaching the barge) and offload them. Scalzo testified that the crew requirements for construction support work could be different from those for ship assist work, but he did not specify how many captains and/or deckhands typically are assigned to perform project work. Due to weather, project work is typically performed in the ice-free months.

Although Scalzo testified that the Employer operates two crew passenger boats, the record does not detail the nature and extent of work performed with those vessels

³ Both parties filed timely briefs.

⁴ The Employer's witnesses were its president and the chief operating officer of Foss Marine Holdings, Steve Scalzo, its general manager, Brad Kroon, and one of its captains, Daniel Butts. Petitioner did not call any witnesses.

or what their crew requirements are. However, General Manager Kroon testified the pay range for crew boat captains was lower than the pay range for other captains. Regardless, the record does not reveal whether there is any distinction between the duties and responsibilities of crew boat captains and those of other captains. The record also does not reflect how many of the Employer's captains are crew boat captains or whether the captains are interchangeable between the crew boats and other vessels operated by the Employer.

Scalzo testified that, generally, the crew sizes on the Employer's vessels vary from two to four, but that its vessels could be manned by as many as six employees, depending on the circumstances. However, those circumstances were not detailed in the record.

In the waters off Alaska, the Employer's captains and deckhands must contend with severe winds, heavy ice, large tides, currents, and ice flows, particularly during the winter. Indeed, the conditions under which the Employer's vessels operate often change quickly.

B. The Employer's Organizational Hierarchy

In addition to deckhands and captains, the Employer employs its president, a general manager, an operations manager (also sometimes called an operations dispatch manager), an office manager, and an office assistant. The Employer also has at times employed a port captain, but that position is currently vacant. The Employer's office staff and management work out of the Employer's offices located in Anchorage.

Foss COO and Employer President Scalzo testified that deckhands report to captains, and captains report to the general manager. General Manager Kroon testified that the port captain, when the Employer has one, falls between the captains and the general manager in the chain of command.

There is little testimony about Scalzo's responsibilities as the Employer's president, though he testified that as Foss COO, he is responsible for helping coordinate the operations of Foss companies, and in particular, for maintaining the quality and safety of the companies' operations, providing coordination and communication among Foss companies with respect to operational issues, assigning and allocating Foss capital, and supporting strategic decision making and business and project development. The record does not establish whether Scalzo typically works at the Employer's offices in Anchorage or in some other location, such as Foss's office located in Seattle, where among others, Foss's vice president and general counsel is located. Further, the record does not disclose the amount of time Scalzo actually spends at the Employer's Anchorage or Seward offices.

In any event, the record reveals that General Manager Kroon is responsible for the overall operation of the Employer's business, including all aspects from managing the vessels to the budgets. Further, the operations manager assists the general manager with day-to-day operations. Specifically, the operations manager primarily handles dispatch, crewing issues, communications with the crews, payroll, invoicing, and ensuring vendors are paid correctly. Additionally, the operations manager helps coordinate the schedules and operations of the vessels, helps with the assignment of some jobs to vessels, and coordinates with the captains to ensure that jobs are feasible.

The port captain position, when filled, falls between captains and the general manager in the chain of command. Kroon testified that the port captain acts as a liaison between the Employer's office and its vessels and may also help coordinate specific projects. According to Kroon, the port captain is usually an experienced captain who "help[s] manage the crew and vessel schedules and things." Kroon did not elaborate further on what the port captain's management functions entail, aside from stating that the port captain "vet[s] [complaints] and determine[s] whether they go further," and "[t]hey reprimand." Kroon stated that the Employer employs either an operations manager or a port captain, but would not employ both at the same time, though he testified that the Employer had an operations manager when it last employed a port captain, from January to October 2012.

C. Duties and Responsibilities of Captains and Deckhands

Captains are responsible for the safe operation of their vessels. To operate vessels, captains must be certified by the Coast Guard, obtain sufficient sea time, successfully complete a licensing exam, and be approved to operate the Employer's vessels by an examiner designated by the Coast Guard. Some of the Employer's captains are certified by the Coast Guard as designated examiners. As a designated examiner, a captain will "supervise the mentoring and actually approve" individuals' capabilities and ensure that they meet the requirements of the Coast Guard's towing officer assessment, known as the TOAR, so that they may operate under a captain's license. The record does not detail specifically what designated examiners actually do to "supervise," "mentor," or "approve" capabilities; what the requirements of the TOAR are; how designated examiners ensure that individuals meet those requirements; or whether any of the Employer's captains has actually served as designated examiner for one of the Employer's deckhands.

Scalzo testified the captains' responsibilities include

managing their crews and vessels, managing relationships with captains and pilots on customers' vessels on ship assist jobs, and meeting customer requirements for project jobs. Scalzo testified that captains are the Employer's first line supervisors.

Captain Daniel Butts testified that he is responsible for safe operation of his vessel, ensuring the safety of his crew and the environment, and performing tasks assigned to him by dispatch. He stated that he is the representative of the Employer on his vessel and is responsible for enforcing the Employer's policies and procedures on the vessel. Butts testified that on an average day, he would be responsible for pushing in one ship or barge and would spend the rest of the day maintaining the vessel. He stated that he would typically only have one crew member on his vessel but may have two for a tricky job. However, the Employer did not provide evidence detailing the regularity and/or frequency with which the deckhands number more than one on a vessel. Butts testified that while a vessel is underway, the captain typically stays in the wheelhouse navigating and tells the deckhand or deckhands to perform tasks such as putting up lines or performing maintenance work using a loud hailer, which is essentially a loud speaker system. While the vessel is not underway, the captain directly performs maintenance work along with the deckhand(s).

Deckhands are responsible for assisting captains in the operation of their vessels and in the performance of ship assist and project work. The assistance they provide includes performing maintenance work, operating equipment on the vessel, and acting as lookout for the captain, as needed. There is some reference to categories of deckhands designated as deckhands/engineers and mates in the record, but the record does not reflect whether the Employer maintains separate formal job classifications for deckhands/engineers or mates, or whether these are just informal designations used by the Employer's management and employees. The Employer does not maintain separate job descriptions for deckhands/engineers or mates.

Seasonal employees (sometimes called cadets) are hired to work for the Employer for only one season and may not return in subsequent years. The record does not reveal the nature and extent of work performed by cadets for the Employer in its operations. However, the record indicates that the cadets' work is at some low level in the process of vessel operation and that their pay is at a lower rate relative to the other classifications. Regardless, neither party seeks to include the cadet classification in any unit found appropriate herein.

D. Indicia of Supervisory Status

1. Hire

The Employer's hiring process is described in the Employer's Responsible Carrier Program (RCP), a policy and procedure manual, and was also described by the Employer's witnesses. The hiring policy set forth in the RCP states that the dispatcher⁵ and operations manager are generally responsible for reviewing applications and conducting personal interviews, and that the general manager is responsible for reviewing qualified applicants for placement. The RCP states that the applicant's application should be reviewed, his or her work history should be researched, and the application file should be submitted to the general manager for approval to schedule a personal interview; however, the RCP does not specify who is responsible for completing these particular tasks prior to submission to the general manager for approval. The RCP later states, "In addition to a Dispatcher or the General Manager, an interview may be conducted by a Port Captain or Senior Captain." However, there is no explanation of the term "senior captain" in the record, or whether any of the Employer's six captains are designated as senior captains. There is also no explanation in the record of whether the policy contemplates one interview being conducted by the dispatcher or general manager and a second interview being conducted by a port captain or senior captain. The RCP further states that during the interview, in addition to explaining the job description and discussing salary and benefits, the interviewer should evaluate the application and discuss the evaluation with the general manager. The RCP then states that the applicant should be given a conditional offer of employment or should be notified that he or she does not qualify, but it does not state who should complete this task. The RCP also states that the new hire should be assigned to a vessel or a floating position between the vessels and that he or she is on a 90-day probation period, during which termination could result from violation of the Employer's policies or failure to fulfill all requirements of the training program. The job description for captains in the RCP does not mention hiring as one of the job functions of captains.

Notwithstanding the RCP, Scalzo's testimony indicates that captains play a more significant role in the hiring process. Specifically, Scalzo testified that captains review applications, interview applicants, and make final determinations regarding hiring. Scalzo explained that captains have good contacts in the industry and reach out to prospective employees when the Employer is short

⁵ It is noted that the Employer does not employ a "dispatcher." The reference to a dispatcher is not explained in the record.

employees. He testified that captains and deckhands may have the names of potential applicants, and that the general manager, operations manager, and captains also review resumes submitted by applicants. Captains, the operations manager, and the general manager shorten the list of candidates to a particular individual or two, based on the candidates' experience in the geographic area and their experience with the type of work performed by the Employer. According to Scalzo, captains then conduct interviews, either on their own, or with the general manager or operations manager. Scalzo testified that if a captain is satisfied with an applicant, he or she can hire the applicant on the spot, as long as a manager has no reason to object. Scalzo did not specify the possible bases for the general manager or operations manager objecting to the hiring of an applicant selected by the captain or the frequency or regularity with which managers object. Scalzo also did not testify that captains' hiring actions occur with no independent investigation by higher level Employer officials.

General Manager Kroon testified, very generally, that a key component of the Employer's operations is reaching out to its staff and requesting any knowledge of experienced personnel the Employer could consider for hire. Kroon explained that when new employees are hired, Foss human resources personnel "make sure they've met all the regulatory tax requirements, all those things, and make sure they get submitted to their benefit plan."

Captain Butts testified on behalf of the Employer at the hearing. Although Butts has been a captain for 20 years, he started working for the Employer in 2007 but in or about late 2010 or early 2011 ceased working for the Employer to teach at Alaska Vocational Technical School for 2 years. Then, in January 2013, Butts returned to work for the Employer. Thus, at the time of his testimony, Butts had only worked for the Employer for about 6 months since Foss acquired the Employer's business.

Butts testified that it is up to the captain of a vessel to decide who will work on his or her vessel. He testified that captains do not conduct formal interviews of applicants. Instead, they bring them on the vessels and let them look around and meet everyone and see how they might like the job. There is then usually a trial period where the applicant rides around on board for a day or so to see if he or she likes the job and can do it. If the applicant is not capable of doing the job, the captains will then give them "a thumbs down." Butts stated, "It's a thumbs up or a thumbs down basically from the captains." Butts stated that although he could not "think of a particular instance or how the hiring actually happened," it is "sort of a group of captains that gets together and

makes the decision and forwarded on from there" to management.

Butts further testified that when deciding whether to recommend an applicant for hire, captains consider experience, qualifications, and personality fit (meaning ability to take orders and perform tasks). However, Butts later testified that when communicating to management that they want a particular applicant to be hired, the captains provide information about whether candidates meet basic criteria, which are discussed with management. Butts did not specify what basic criteria are discussed with management or what discussions actually ensue about these criteria. Butts stated that management then hires applicants and that the applicants are hired upon the captains' request, and that it was the captains' determination whether they are hired or not. Butts stated that the captains vet the crew members and that management goes off their recommendations about whether or not to hire the applicants. Butts stated that he did not know whether management does its own investigation of applicants after the captains forward their decisions to management, or whether management conducts its own interviews of recommended applicants. Butts testified that the amount of time that elapses between the captains' recommendation to hire applicants and their actual hire is determined by management and depends on when the position needs to be filled and on the workload. Again, Butts provided no concrete examples in this regard.

Although the Employer's witnesses testified about the captains using a collaborative process to decide which applicants to select or recommend, none of them testified about how the Employer would resolve a dispute among captains about whether an applicant should be hired. The Employer also did not introduce evidence detailing what the Employer does to investigate applicants after they are selected or recommended for hire by the captains. Additionally, the Employer did not provide any testimony or produce any documents establishing the frequency or regularity with which applicants recommended for hire by captains are, in fact, hired.

The Employer's witnesses provided several examples of employees who were hired with the involvement of captains. Scalzo and Kroon both testified about the hiring of Captain Richard Murphy. Captain Butts did not testify about the hiring of Murphy.

As for the first example, Scalzo initially testified that within 6 to 8 weeks before the hearing in this case, the captains reached out through their contacts, came up with several candidates, and decided to bring one individual in for the season. Scalzo testified that the captains brought this individual in, offered him the job, and told him what his compensation level was going to be. Scalzo testified

that the captains mentored this individual through the initial period of getting used to operating in the area, as he lacked experience in the area or on the type of vessel he would be operating. Scalzo said that the captain who actually hired this individual worked with him for several weeks on the vessel. When asked to identify the captain who actually hired this individual, Scalzo responded by providing the name of Jordan May but in that testimony it was not clear whether May was the captain who was hired or the one who did the hiring. In short, Scalzo's initial testimony did not clarify whether he was referring to the hire of Murphy. However, in later testimony, in response to a leading question asked by the Employer's Counsel, Scalzo testified that Captain Jordan May hired Captain Richard Murphy.

Kroon testified that May hired Murphy sometime after Foss acquired the Employer's business in 2011. Kroon testified that at the time of Murphy's hire, the Employer was seeking additional captains, and May contacted Murphy, a tugboat captain whom May knew, and asked if he was available. Murphy then contacted Kroon to tell him he was available. May told Kroon he wanted to hire Murphy. May explained to Kroon that he had worked with Murphy at another company and said he was well qualified and that he could run both types of vessels the Employer operates, which is an unusual skill. Kroon stated that he took May's word concerning Murphy's skill, ability, and other qualities. When he was essentially asked to clarify whether May brought Murphy forward as a candidate or whether May hired Murphy, Kroon stated:

Well Jordan contacted [Murphy] and asked if he was available. And Rick, he goes by Rick, reached out to myself to let me know that he was available. And then I can't remember all the details of the e-mails and conversations, but in essence Jordan offered him a wage and he accepted . . .

Kroon went on to state that May told Murphy what his wage rate would be and that Kroon followed up with an e-mail stating that was the accepted rate. The Employer did not introduce any emails between Kroon, May, and Murphy relating to the hiring of Murphy. When asked if he accepted May's recommendation that Murphy be hired, or if he did any independent vetting of Murphy, Kroon responded, "Yes and no. I mean most of the time, we take recommendations, but we're still under the authority of the Coast Guard and those entities so we have to do our due diligence to make sure that all their documentation is in place." Kroon did not further elaborate on specifically what is involved in "mak[ing] sure that all their documentation is in place." Kroon stated that he

also followed up to make sure Murphy was truly available.

Captain Butts testified that he has hired about two deckhands, both before Foss acquired the Employer's business in 2011. Butts only provided specific testimony about the hiring of one of those two deckhands. Butts testified that in 2009, he hired Wayne Humbert as a deckhand. Humbert later became a captain. Butts stated that he did not know if Humbert filed a formal application. Butts stated that the Employer needed a crew member, and he knew Humbert was working on a tugboat in the Gulf of Mexico and asked if he would like to work for the Employer. Butts knew of Humbert's job qualifications and asked the other captains about Humbert before he was hired. Butts stated that he recommended Humbert's hire to management. When asked if Humbert was hired before or after Butts informed management that Humbert was a good fit, Butts stated, "I don't—I don't know. I mean we—we vet the crew members. And again, the management goes off of our recommendations of whether to hire or not to hire that person." Butts did not recount any specific conversation he had with management about Humbert before he was hired. Moreover, the Employer did not call any other witness to testify about what, if any, independent investigation of Humbert was conducted prior to his hire and following Butts' purported recommendation.

Kroon, who was previously employed by the Employer as a captain, testified that he hired "a multitude of people over the years." Kroon testified that a number of years ago, before the Employer was acquired by Foss in 2011, when Kroon was a captain, he hired his nephew, Carrey Allen Johnson, as a deckhand. Kroon stated that he knew the Employer was looking for seasonal employees at the time, and talked to Johnson, who was a college student, about the job. Johnson said he was willing to do it, so Kroon talked to the owner at the time, and the Employer "brought him up." The Employer did not present any evidence concerning what, if any, independent investigation the Employer conducted before hiring Johnson. Kroon also testified that as a captain he thought he hired Captain Jordan May sometime before Foss acquired the Employer's business in 2011, and that he thought he hired Captain Butts sometime after Foss acquired the Employer's business in 2011. Kroon did not recount the process followed when hiring those two captains, aside from saying that Butts contacted Kroon after he put the word out to the Employer's employees that the Employer was looking to fill a slot. Kroon did not state whether he was a general manager or a captain at the time of Butts' hire. Butts did not testify about the process followed by the Employer when he was hired.

Kroon also named several other individuals who were hired by captains, but he did not provide details about the process followed by the Employer when the others were hired. In particular, Kroon testified that Captain Wayne Humbert hired Jeff Brumfert and Mike Nichols, Captain Daniel Butts hired Duke (last name unspecified), and Captain Pat Noland hired deckhand Jacob (last name unspecified) in Seward in March 2013. Kroon also testified that Captain Mark Theriault has been “involved” in hiring employees and “has an input” but “doesn’t necessarily like to be responsible if people don’t work [out], so he’s a little tentative on” hiring employees.

The Employer provided no documents relating to concrete examples of captains’ hiring or effectively recommending the hiring of any employees.

2. Promote

Butts testified that he has the authority to promote deckhands. In particular, he stated that if deckhands are performing their tasks and have the proper certification, they may be elevated to mate status. Butts testified that deckhands are brought up to mate status based on proper certification and job performance. Butts did not further elaborate upon what factors he or other captains consider in deciding whether a deckhand’s job performance is sufficient to warrant their elevation to mate status. Butts stated that mates see more of the work captains perform than deckhands see, and at least some mates are qualified to drive the vessel under the captain’s supervision. Butts described the captain—mate relationship as a mentorship.

Butts stated that when he selects a mate, he reports to management that he is grooming the deckhand to be a captain and that he would like the deckhand to sit in the wheelhouse to learn to drive the boat and perform other duties. Butts testified that the captain then brings on another deckhand from another vessel or requests another deckhand from management to perform deckhands’ duties while the deckhand selected as mate is in the wheelhouse observing the captain’s actions. Butts testified that getting an extra deckhand in such circumstances does not need to be approved by management. However, Butts offered no details regarding the regularity and/or frequency with which a captain may bring on another deckhand without management’s approval and he did not describe what circumstances permit a captain to bring on another deckhand without the involvement of management or the circumstances under which the involvement of management occurs.

When asked what a mate is, Butts testified, “A mate—there is a mate of towing. It’s not an official, in our—on our station bill, but we will also have mates that are qualified to drive the boat under the captain’s supervision.

And that’s a Coast Guard certification.” When asked if becoming a mate was a promotion, Butts testified:

It’s more of a captain in training. You’re grooming someone from a deckhand’s position to get into the captain’s chair eventually. And it’s your job as a captain to kind of train and bring along your crew. And at certain levels, when they get certain certifications, you can show them your responsibilities and start to groom them, when they are certified to be able to become a captain.

Butts testified that he did not know whether being selected by a captain as mate actually entailed a change in a deckhand’s job title with the Employer. Butts did not know if deckhands received raises when elevated to mate status or mate in training status. In describing employees’ pay rates, Kroon testified that mates earn \$400 to \$500 per day, while regular deckhands earn \$300 to \$400 per day.

As noted above, the record does not clarify whether the Employer maintains an actual mate position, or whether the mate classification is just an informal designation used by captains to refer to deckhands whom captains have decided to train on captain work. Indeed, the Employer did not introduce a separate job description for a mate position, payroll records, employee rosters, or other documents reflecting whether the Employer maintains a separate job classification for mates or showing the actual pay rates of particular individuals designated as mates. Moreover, the Employer also did not introduce evidence concerning what, if any, review the Employer conducts, before it classifies a deckhand as a mate and gives him or her a pay raise.

3. Discharge

Scalzo testified that captains can discharge employees on their own without conferring with him. When asked if captains may discharge employees without conferring with anyone else in management, Scalzo replied:

Yes, if they think it’s absolutely necessary and the circumstances warrant it, yes. That’s their clear responsibility. We don’t want the crew, the vessel, or the cargo to be, in any way, compromised by the – by any crew member that they don’t think is performing well. And they can do that. I think they have done – they have done that. And they’ve also worked in concert with other captains and the manager of the operation also to do that.

When asked if captains can, together, decide to discharge another captain without any involvement from the general manager or Scalzo, Scalzo replied:

Well, usually I don’t need to get involved in it and I

don't get involved. Usually, if it's at the level of the captain, unless it's, you know, immediate and/or a succession of issues that have cause [sic] it – that they feel is appropriate for termination at the captain's level, they talk about it. They discuss the recommendation. And then they act upon it. They, the captains, with the general manager.

However, Scalzo did not provide any more specific testimony about under what circumstances a captain or a group of captains could decide to discharge an employee without first conferring with the general manager. Although Scalzo testified that deckhands have been discharged for inadequate performance at the recommendation of their captains, and that a captain has discharged a deckhand without consulting with anyone else, he could not give specific examples of when that has occurred.

Butts testified that he has absolute authority onboard his vessel and would discharge a crew member for insubordination. He testified that if there is direct insubordination by a crew member, and Butts feels the crew member is affecting the safety of the vessel or crew, he could and would terminate the crew member on the spot. Butts further testified that he could terminate deckhands for insubordination, neglect, fighting, sabotage, and drug or alcohol use. Although Butts testified that he has discharged deckhands while working for other employers, he admitted that he has never done so while employed by the Employer.

The Employer's witnesses did not describe what, if any, investigation its managers do before accepting captains' decisions or recommendations to discharge employees. They also did not specify what would happen if there were disagreement among the captains about whether an employee should be discharged. The Employer also did not introduce any evidence regarding whether or not the Employer has declined to discharge an employee after a captain has decided or recommended that the employee be discharged, or any evidence establishing the frequency or regularity with which the Employer accepts captains' decisions or recommendations to discharge employees. Moreover, the Employer provided no documents relating to any concrete examples of discharge actions taken or recommended by any captain or captains as a group.

The Employer offered three examples of employees who have been discharged by the Employer. The three discharged employees were Captain Daniel Wright, Captain Shawn Van Deusen, and a deckhand based in Seward.

General Manager Kroon testified that seasonal Captain Daniel Wright, who was hired to operate a push tug for a construction project on Fire Island, which is located in

Cook Inlet south of Anchorage, was discharged after going underneath a dock and damaging a barge, a tug, and the dock while doing a beach landing. When questioned about the decision by Employer's Counsel, Kroon initially testified that he concluded that Wright should be terminated after the incident precipitating his discharge. However, he then stated that even before the incident there were discussions about whether to discharge Wright. When questioned about those discussions by Employer's Counsel, Kroon testified to the following:

Q. And those discussions were with the captains?

A. Yeah. Since—since I've kind of removed myself from the daily involvement of the operations, I rely heavily on the captains to kind of fill me in on, you know, who's down there, who's worth what, and there was a lot of. . . .

UNIDENTIFIED MALE: Who's still employed.

A. Because of performance and personality issues, there was [sic] some discussions about whether we should terminate him before the end of the season[s]. . . .

Q. Okay.

A. . . . at one of our captains' meetings.

Q. Okay. And did you want to terminate him before the end of the season?

A. I did. I did. And. . . .

Q. And did your captains want him terminated before the end of the season?

A. Yes, they did. We had. . . .

Q. But did they decide to terminate him before the end of the season?

A. Well, we had lots of discussions about that. And, unfortunately, because of the demand for captains and the inability to find licensed personnel in the midst of the season, it was discussed with the captains that, yes, we could terminate him. However, the workload, because we didn't have somebody to fill that role full-time, would fall on them. And it was discussed and decided that we would keep him for another month until the end of the season and. . . .

Q. So who made that decision?

A. The captains.

Q. So you left it to them to determine whether he was going to be terminated now or terminated later?

A. Well, we were just trying to decide whether we would terminate him at that time or whether we'd let him ride [to] the end of the season. He'd already been there a couple months. He had about a month left, if I remember correctly at that meeting,

to be—to meet the obligations of our contract to the end of that year for providing that service to Fire Island.

Q. And they decided to let him stay?

A. Yes.

Q. And you went along with that decision?

A. Regretfully so.

Q. Because after that decision....

A. Because of the incident, yeah.

Q. . . . he ran under the bridge?

A. Correct. Well he did some poor judgment after the investigation that caused the incident. But more importantly so, it was his judgment after the fact that we were in—that he sent personnel down below decks at the point of contact with the dock that really cemented my belief in his termination.

Kroon did not further specify what was said by whom in the discussions that led to Wright's discharge. The Employer did not provide any documents related to the decision to discharge Wright, such as minutes or notes from the many discussions the captains had regarding the Wright. Captain Butts did not testify about Wright's discharge.

Kroon testified that Captain Shawn Van Deusen was disciplined and later discharged after an incident in which he failed to attach an ice wire used to secure the flow of ice during the winter, resulting in ice hitting and damaging the Employer's facility. Kroon testified that initially after the incident, "We discussed the issue. We felt that it wasn't 100 percent his fault. With the environment, nobody knew. So he was given a verbal warning by [Captain Mark Theriault] that he needed to step it up." Kroon explained that Van Deusen then refused to help the rest of the crew, as they worked to maintain the integrity of the facility after the ice struck the facility, and instead watched television as the crew worked. Kroon stated that Van Deusen's actions had a negative impact on morale, "so there was a lot of discussions about his performance [*sic*]." Kroon gave the following account of the discussions of Van Deusen's performance, when questioned by Employer's Counsel:

Q. A lot of discussions with who?

A. With the captains and even with the crew. The crew were disgruntled as wells [*sic*], because they were out working hard. And so they would complain to the alternate captains.

Q. Okay. But the crew wasn't making the decision?

A. No.

Q. Who was making the decision?

A. The other captains.

Q. And they made the decision based upon the complaints and their observations?

A. Yes.

Q. Okay. And did you accept their recommendation to terminate?

A. Yeah. It was—yes. And. . . .

Kroon did not further specify what was said by whom during the discussions that led to Van Deusen's discharge.

Kroon stated that he asked Captain Mark Theriault to inform Van Deusen of his discharge because Kroon was scheduled to be on vacation and could not delay in implementing the discharge. Kroon testified that he told Theriault that he could give Van Deusen the option to quit instead of being discharged. Theriault agreed. Theriault later sent Kroon an email explaining that Theriault had informed Van Deusen of his discharge and that he had the option to quit rather than be discharged. Theriault stated in the e-mail that Van Deusen said he was not expecting the discharge, that he requested to have a meeting describing the reasons for the discharge, and that Theriault told Van Deusen his request would be passed on [presumably to management]. Theriault said in the e-mail that Van Deusen did not respond to or choose between the options of quitting or being discharged.

Other than the e-mail from Theriault to Kroon about Van Deusen's discharge, the Employer did not provide any documents related to the decision to discharge Van Deusen, such as notes documenting the many discussions with the complaining captains and crew members about Van Deusen's performance. Captain Butts did not testify about Van Deusen's discharge.

Kroon also explained that a deckhand based in Seward was discharged after failing to complete the Employer's Employee Assistance Program (EAP). The deckhand twice told the captain he was not able to perform when called into duty because he had been drinking. Kroon explained, "So that brought up the conversation with that individual that they either needed to seek help, or they were terminated, through our Employee Assistance Program." Kroon did not specify who had that discussion with the deckhand. Kroon stated that the deckhand did not complete the EAP, which prompted the discharge. When asked in the form of a leading question by Employer Counsel if Captain Pat Noland terminated the deckhand, Kroon testified, "Yes, I believe so." However, Kroon did not testify to the nature and extent of Noland's role in the discharge. Further, Kroon did not describe what, if any, discussions Noland had with Employer management about the employee before his discharge. Again, the Employer did not introduce any doc-

uments related to the Seward deckhand's discharge, including any communications between Noland and the Employer's management about the discharge.

When asked if other captains had terminated employees, Kroon responded, "Yeah. I would say so. I can't—I know there's—I mean I've been down there for a number of years and I've gone through hundreds of employees. And as a deckhand, I recall a few individuals who were involved in substances." However, Kroon did not describe any particular discharges, other than those of Wright, Van Deusen, and the employee in Seward.

Scalzo testified, apparently in reference to Daniel Wright and Shawn Van Deusen, that captains have been terminated because of other captains a couple times within the last 2 years, and that in both of those instances, the captains complained about the individual and said they felt a captain was not performing adequately and should be terminated. Scalzo further testified, apparently in reference to Van Deusen, that the captains had recommended that a fairly long-term captain who ran a push tug be discharged because he was not pulling his weight, as far as they were concerned. Scalzo stated that the president and other managers did not conduct an independent investigation before the discharge, though he admitted that the general manager was part of the meeting where the captain's performance was discussed. Scalzo stated that he read a letter from an employee complaining that the discharge was unjust after the fact but that Scalzo decided to let the discharge stand after reviewing the letter.

4. Assign

The record reveals that captains and deckhands are assigned rotating schedules, working one week and having the next week off. Their work hours are determined by the tides and the jobs they are assigned to perform. Generally, a captain works with his same crew member during the weeks when the member is scheduled to work. Butts testified that he determines which crew member will generally work with him but he also added that captains generally will not disturb deckhands' normal work rotations because captains need a particular deckhand to be on a particular vessel. Kroon similarly testified that deckhands are "usually vetted by the captains on whether they're acceptable on their boat." Kroon explained that he recently allowed a captain to select a deckhand to work on his vessel after another deckhand quit.

Scalzo testified that captains will only allow a deckhand to work on a vessel if that individual has been selected, approved, trained, and mentored, and is capable of performing his or her job. However, the Employer did not introduce more specific evidence about the factors considered by captains in selecting deckhands to work on their vessels. Once they have been selected to regularly

work with a particular captain, deckhands are able to generally predict their schedules well in advance. At the time of hearing, the Employer employed six captains and six deckhands.

Captains determine the crewing requirements for particular jobs. Although Scalzo testified that there is regulatory guidance regarding crewing, the Employer did not introduce specific evidence concerning the nature or extent of that guidance and its impact on determining crew size. In describing captains' discretion in determining crewing requirements, Scalzo stated only that captains determine crewing depending on the job, project, or transit to ensure safe passage of the vessel. If a captain needs more than one deckhand for a job, he or she may request the additional deckhand from another captain's vessel or can call the office to request an additional deckhand.

Once captains and deckhands are scheduled to work, they can work out changes to their schedules among themselves, as long as the Employer has sufficient crew members for the job being performed. Captains and office personnel can help find deckhands to cover for other deckhands when deckhands need days off. Captain Butts testified that captains may veto changes to deckhands' normal schedules if they need a person with particular capabilities to be onboard for a particular job, but he testified that captains do not often veto schedule changes. Butts did not provide any specific examples of instances in which any schedule changes have been vetoed.

The Employer introduced a Coast Guard policy letter providing that captains are responsible for ensuring that the vessel crew is properly rested and compliant with work-hour limitation laws. The letter sets forth how many hours may be worked during a particular day, depending on various circumstances. The letter further provides that captains are responsible for communicating with their employers to ensure realistic goals are set and are encouraged to report pressure to exceed the law to the Coast Guard. The Employer did not provide testimony explaining the nature and extent to which captains must exercise any independent judgment regarding complying with the requirements of the Coast Guard's policy letter.

Captains do not decide which captains and their crews will be assigned to complete which jobs. Rather, the record reveals that job orders typically come through the operations manager, though they are sometimes communicated directly to captains. When the operations manager receives an order from a customer saying it has a vessel coming to the harbor at a particular time, the operations manager relays that information to a captain, who then decides how to respond to the call. For example, the captain may decide, based on the weather conditions,

to leave early to break up the ice on the route to the dock and make sure the facility is ready; he or she can decide not to do the job at all if the conditions are too unsafe at the time; and he or she can decide to use two vessels rather than one if it is unsafe to complete the job with just one vessel. The captain also decides which crew members and vessel or vessels to use. Captains make such determinations without consulting with the operations manager or general manager. The captain will report to the office if a job takes longer than expected or is not completed at all, due to the conditions, so that the Employer knows how to bill the customer. The record does not establish which specific factors are taken into account when a captain decides not to complete a job or when a captain decides whether more than one vessel is needed for a job.

Butts also testified that captains can grant deckhands short periods of time off. He stated that captains will generally ask a deckhand from another vessel to fill in for deckhands taking time off. However, he did not specify what factors a captain would consider in deciding whether to grant a request for time off and did not provide any specific examples of instances in which requests for short periods of time off were granted or denied. Moreover, there is nothing in the record regarding whether a deckhand has an avenue to appeal a denial of time off to upper management or may utilize the informal system the Employer maintains of swapping work with another deckhand.

5. Reward

Scalzo testified that when a deckhand or captain is hired, his or her initial pay is set by captains, or by the general manager or operations manager with the recommendation of the captains. However, Scalzo did not provide any specific examples of instances in which captains recommended or set employees' initial pay rates. Moreover, Captain Butts testified that he does not have the authority to set the pay of deckhands. Butts testified that when he was involved in the hiring of Wayne Humbert as a deckhand in 2009, before Foss acquired the Employer's business, he was not involved in setting Humbert's pay rate. He testified that management contacted Humbert to inform him of his pay rate.

General Manager Kroon testified that the Employer sets employees' pay rates using input from its captains. Kroon stated that multiple factors are taken into consideration in setting employee pay rates, including the industry standard for wages, performance, recommendations, and, most importantly, the captains' input. Kroon testified that at some unspecified time, he had asked the captains for input concerning pay rates. He discussed the performance of deckhands and captains with the cap-

tains, and Captain Mark Theriault sent him an e-mail dated November 29, 2012, setting forth employees' current pay rates and suggesting new pay rates. Kroon stated after discussing employees' performance with the captains and reviewing Theriault's recommendations, he made a final decision concerning changes to employees' pay rates, accepting some, but not all of Theriault's recommendations.

The Employer may contend that captains possess the authority to reward employees in connection with granting deckhands time off. As employees' scheduling matters generally fall under the Section 2(11) indicium of assign, I have set forth under Section D.4 (ASSIGN) above, the critical record evidence on granting time off rather than here. Regardless, my analysis below will address this possible Employer contention.

6. Discipline

Although the Employer maintains progressive disciplinary policies both in its employee handbook and the RCP, the record reflects that the Employer's actual practice of responding to misconduct or poor performance is far less formal than the procedures set forth in those policies.

The progressive disciplinary policy set forth in the employee handbook provides a number of disciplinary options including, but not limited to, oral warnings, written warnings, performance plans, and discharge. The policy states that oral warnings will be documented for future reference. The policy states that there is no requirement that the process be followed in any individual circumstance or that the process necessarily proceeds to any particular step. The handbook further states that the Employer reserves the right to depart from its standard disciplinary procedures when, in its discretion, such a departure is warranted.

The progressive disciplinary policy in the RCP states that in most instances, minor infractions will result in a verbal or written reprimand or counseling from management personnel. The policy states that employees who are counseled on their behavior should understand that their performance is expected to improve and that there should be no need for additional counseling sessions. The RCP further states that repetitive counseling for failure to observe company policies or acceptable standards of conduct will result in dismissal. Neither the Employer's progressive disciplinary policies nor the job descriptions for the positions of captain and deckhand state that captains are authorized to discipline employees.

Nonetheless, Kroon testified very generally that captains are authorized to discipline employees on their vessels. Butts testified that verbal warnings, as far as he understands, are up to the discretion of the captain. With

respect to written warnings, Butts testified, "And it's up to the captain to direct or tell management that this person needs to be written up. And it's our job to write up that person." Butts explained that if he thought insubordination or failure to perform job duties needed to be documented in an employee's file, he would tell management. Butts stated that there is no set number of verbal warnings that will lead to the issuance of a written warning. Butts did not know how many written warnings would lead to discharge.

Kroon testified that his office probably does not maintain any records of verbal warnings. When asked how a verbal warning differs from an instruction or guidance on how to do something, Kroon replied:

Well, we leave it up to the captains really to determine their disciplinary action on their vessels. Sometimes with a small, cohesive group like we have, you know, it's pretty informal. So a lot of times it's simple enough just to talk to the crew member, hey, you're not performing your duties. And the captains are free to elevate it as they see fit if it's a continued performance issue.

Butts similarly described an informal method of responding to a failure to perform job duties. Butts stated that when a deckhand fails to perform a task correctly, he will show the deckhand how to perform the task but will not report the issue to management or prepare any written documentation of the issue.

Kroon testified that a captain may elevate a performance issue by taking action ranging from writing a letter to the employee's file to terminating the employee and that letters to employees' files are not sent to anyone else to review, though they are "tracked" by the operations manager. Butts explained that he knows he is authorized to report a verbal warning to management to be placed in an employee's personnel file because he has been advised of that authority in captains' meetings and in a manual (though neither the RCP nor the employee handbook indicates that captains have such authority).

Although Kroon and Butts testified that captains were authorized to take disciplinary actions, when asked if he could override a decision by a captain on a personnel matter, Kroon said he supposed he could, depending on the infraction, but he stated that he had never done so. Indeed, the record does not reveal any evidence that Kroon has overruled a captain's decision or recommendation to issue a verbal warning or other discipline. The Employer provided only three examples of the issuance of verbal warnings to employees.

As for the first example, Kroon testified that in No-

vember 2011, after an incident in which he failed to timely attach an ice wire, resulting in damage to the Employer's facility, Shawn Van Deusen "was given a verbal warning by [Captain Mark Theriault] that he needed to step it up." Kroon did not know if the verbal warning was placed in Van Deusen's personnel file. When asked if Theriault talked to Kroon before giving the verbal warning, Kroon said, "Yes. Mark was pretty upset, because he was the one that staged all the equipment for putting up the ice wire so he was pretty upset that Shawn hadn't done the last step." Kroon testified that he authorized the issuance of the verbal warning to Van Deusen, that Kroon and Theriault discussed the warning, and felt it was appropriate. Kroon did not know if the verbal warning was placed in Van Deusen's file, and the Employer did not introduce the verbal warning or any other documents related to the discipline of Van Deusen into the record.

When asked if he knew of captains issuing verbal warnings without consulting with him first, Kroon stated, "I would say yes." When asked to provide an example, Kroon provided the following testimony about a verbal warning presumably issued by Captain Butts (the second example):

Q. And could you provide an example?

A. Let's see. I have to go back a little ways because—there was an incident with—I believe—I believe it was Dan. Garrett and Eric alternate as deckhands on their tug. And Garrett was not doing all his sanitary, which means cleaning the boat, between trade outs. And so there's exceptions when that's acceptable, if the boats are busy and you don't have time. And so, yeah, it was discussed. . . .

Q. And. . . .

A. . . . after the fact.

Q. Oh, I'm sorry. So it was discussed by the captain?

A. The captain reprimanded—this was back when Dan worked for us initially. So it was 2008ish, I want to say, that I recall as an incident.

However, Butts did not testify about the issuance of the discipline to Garrett, and the Employer did not introduce any records or documents related to the matter into the record.

Regarding the third example, Kroon testified that on unspecified dates, a deckhand based in Seward twice told his captain that he could not come to work when called in because the deckhand had been drinking. Kroon explained, "So that brought up the conversation with that individual that they either needed to seek help, or they were terminated, through our Employee Assistance Pro-

gram.” Kroon did not identify who decided the employee would need to participate in the EAP or who was involved in that decision, whether the conversation with the deckhand was considered a verbal warning, whether there exists any form of discipline in the deckhand’s personnel file regarding the matter, or whether the deckhand’s failure/refusal to complete the EAP program automatically triggered a discharge action. Indeed, the Employer did not introduce a verbal warning or any other documents related to this matter involving the deckhand in Seward.

Butts testified that he has verbally disciplined a deckhand, but he did not describe his issuance of a verbal warning to any employee of the Employer. Butts testified that he had never written up or suspended a deckhand and stated that he did not believe suspension was part of the Employer’s disciplinary procedure.

In sum, the Employer did not introduce any verbal warnings, written warnings, performance plans, or other documents related to discipline issued to any of its employees other than an e-mail relating to notifying Van Deusen of his option to quit or be discharged.

7. Responsibly direct

Scalzo testified that captains are in charge of their vessels and are responsible for everything on their vessels. Scalzo further testified that captains decide what tasks deckhands should perform and how those tasks should be performed. Butts similarly testified that as captain he is the “end-all, be-all” and is the person in charge of the vessel, the safe operation of the vessel, the safety of his crew, the safety of the environment, and completing tasks.

Butts testified that captains are responsible for establishing routes. On a daily basis, they decide whether to change course based on the weather and the prevailing conditions. Butts testified that for longer voyages, for which the Employer and the Coast Guard require a voyage plan setting forth step by step directions for the voyage, captains create the voyage plan. Captains can decide to deviate from their voyage plans based on factors such as crew scheduling needs or the need or requirement to assist a vessel in distress.

Butts, who largely performs ship assist work, testified that as he is in the wheelhouse maneuvering a vessel, he uses a loud hailer, which is essentially a loud speaker, to give his crew directions about tying lines from the bow of the tug to the ship being towed. He said that he considers the conditions, including the presence of ice and the maneuvers he plans to make in giving those directions. Butts testified that captains direct deckhands in all aspects of safe navigation by directing them to help navigate or serve as lookouts under watch conditions,

such as darkness or fog; secure items on the deck as needed as the seas get rough; do extra engine room checks when needed; and ensure that the vessels are safe. Butts further testified that captains direct their deckhands in responding to the prevailing conditions. For example, captains will tell their deckhands how much wire to have out when a tugboat is towing something in shallow water, they will direct deckhands to close the hatches or have equipment on standby in certain conditions, and they will direct deckhands to be in the engine room if there is an issue with an engine. Butts testified that in deciding which deckhand will perform which task, he tries to play to their strengths. He explained that some deckhands are good in the engine room, some are good at getting safety equipment, and some are good at getting the lines out. However, admittedly, Butts generally works with just one deckhand. There is little in the record (e.g., workforce attrition rate) to determine whether the relatively small work force of the Employer lends itself to captains readily discerning the strengths and/or weaknesses among the handful of deckhands currently employed in the petitioned-for unit.

Scalzo testified that for project work, captains give deckhands direct orders regarding how to tie up and untie barges and how to assist in loading and offloading cargo. They also decide where and how to beach barges and give guidance concerning the operation of the ramp onto the beach to ensure the safe offloading of cargo.

Captains also direct deckhands in performing maintenance and preventative maintenance work. Captains are responsible for ensuring that their gear is in working order and that they have everything they need to perform their work. Captains direct deckhands to maintain winches, deck machinery, and safety equipment. Although captains help with maintenance work themselves while their vessels are not underway, they generally direct their deckhands to perform maintenance work while underway because they are in the wheelhouse navigating. Scalzo testified that maintenance of vessels for the season is discussed in captains’ meetings in the spring and that captains go through their vessels, prioritize the maintenance requirements, and, together with their managers, determine what can get done. Scalzo stated that captains then supervise work performed by crew members and outside vendors on their vessels. Scalzo testified that captains prioritize maintenance tasks by taking into consideration the crew and the vessel and the job at hand, so that tasks like painting would have lower priority. Scalzo testified that captains try to play to their deckhands’ strengths in directing them to perform particular maintenance tasks.

Captains also train deckhands, ensuring that they are

familiar with all the safety equipment on their vessels and regularly run safety drills to ensure their deckhands know the appropriate actions to take in case of emergency. As explained above, they also select deckhands as mates based on their certifications and performance and train those deckhands selected as mates to become captains. Captains allow the deckhands to observe their work in the wheelhouse so that they may learn to operate vessels themselves.

Captains may also give directions to other captains under certain circumstances. For example, when two captains are working together and two tugs are involved, the record reveals that one captain takes the lead calling out orders to the other captain when their coordinated efforts are required.

The Employer's witnesses explained that weather and other conditions in the Cook Inlet region must be taken into account by captains in performing their work. In particular, captains must consider the weather, tides, current, water depth, and ice conditions. Because of the extreme tides in the area, captains must be cognizant of timing, so that they can move barges where they need to be before the tide recedes. Captains must, therefore, communicate with their deckhands and customers about how long they have on the beach or on a dock before the tide ebbs.

As noted above, in directing their deckhands to perform work, captains are also responsible for ensuring deckhands get sufficient rest. Coast Guard regulations require that deckhands work no more than 12 hours in a 24-hour period, so captains must decline to perform work that will cause their crew to work longer than Coast Guard regulations allow.

The record reveals that captains' operation of their vessels is governed by a multitude of Coast Guard regulations, which for the most part were not introduced at the hearing, and also by the Employer's RCP. The Employer's RCP includes operating procedures that captains follow in operating their vessels. Butts testified that implementing those operating procedures is a significant, if not the most significant, part of what captains do. Those operating procedures set forth the responsibilities of captains and deckhands during operations such as navigation, change of watch, communications with vessels and the office, vessel maintenance, fueling, and emergencies. Although the RCP delineates some responsibilities of captains and deckhands, it generally does not incorporate detailed descriptions of how vessels should be operated or what particular tasks should be performed by captains or deckhands during ship assist or project jobs. Captains may elect not to follow the procedures set forth in the RCP to ensure the safety of their vessels. However, the

Employer did not give any examples of instances when captains have deviated or would need to deviate from the RCP.

Before the Employer implemented the RCP in 2013, captains were asked to review it and ensure that it covered all operations and procedures. Captains then gave input concerning the content of the RCP. Butts testified that he suggested changes to a portion of the RCP delineating the responsibilities of crew members in the event of different types of emergencies, and those changes were made. The record does not reflect what specific changes Butts recommended. The record also does not reflect what changes were suggested by other captains or the extent to which other captains' suggestions were rejected or followed. The introduction to the RCP encourages all employees to continually provide suggestions to their supervisors about how to improve the RCP or the Employer's operations.

Although there was testimony that captains may discipline or discharge deckhands if they refuse to perform a task as directed, the Employer did not provide any concrete examples or documentary evidence of instances where that had happened.

The Employer's witnesses testified that captains are held responsible for the operation of their vessel and the actions of their crews. They can be disciplined or discharged if a deckhand does something that negatively impacts the safety of the vessel or environment. Butts testified that although he is not aware of any captain, including himself, ever being disciplined for a deckhand's error, he knows of the consequences because it is the essence of being a captain, because it is part of the job and is true of any job, and because it is a Coast Guard requirement. He further testified that he knows of the consequences from the Employer's manual, though neither the RCP nor the employee handbook states that a captain may be disciplined or discharged for a deckhand's performance or lack thereof. Butts testified that the Coast Guard could also take action if his crew did not fulfill its duties.

Scalzo testified that captains may also be rewarded for deckhands' performance. He explained that in 2011, when ice damaged the Employer's facility, the captains determined how to accomplish the repair and supervised the deckhands in doing the work necessary to hold the facility in place through the winter. In particular, they moved a tug away from the facility to break up ice and tied a tug up along the facility and ran its engines to ensure that everything stayed in place. They "supervised the crews in safely operating at the location" and gave them direction in pumping out tanks in the float barge to prevent flooding, in removing ice, and in moving the

gangway. The captains received bonuses for their work. The record does not reveal whether the deckhands also received a bonus for their work.

Kroon could not think of any captain being disciplined for the performance of his or her deckhands. Kroon also could not recall the Employer having any written policy stating that a captain could be held responsible for the performance or error of a crew member or deckhand, though Kroon testified that the Coast Guard likely maintained a written policy to that effect. Again, the Employer did not submit any such policy into the record. Moreover, the Employer did not introduce any evidence of a captain being disciplined, evaluated, or otherwise held responsible for the performance or error of any crew-member or deckhand.

8. Adjust grievances

The Employer introduced evidence that captains play some role in resolving certain types of issues that arise on their vessels and are responsible for reporting discrimination or harassment.

Butts testified that if there is a conflict between deckhands or a complaint by a deckhand about a problem with the vessel, he has the authority to resolve those issues in certain cases. For instance, Butts testified that if a deckhand complains of a problem with a boat, such as the deckhand's quarters on the vessel smelling, it is Butts' duty as captain to try to right that situation, if possible, for the sake of crew morale. Butts testified that there were a number of instances where he resolved conflicts among deckhands while working for other companies, but he admitted that he had never resolved any conflicts among deckhands while employed by the Employer.

The evidence also establishes that the Employer's employee handbook provides that in the event a captain receives a report or complaint of discrimination or harassment, he or she must promptly relay the report or complaint to the Employer's president so that appropriate action can be taken. The policy states that a captain who witnesses an act of harassment or receives a complaint of harassment and fails to take appropriate action is also subject to discipline.

Kroon testified that captains "can" also have an investigatory role upon becoming aware of discriminatory conduct, though he could not recall an instance when a captain actually performed such a role for the Employer. Kroon also could not recall any instances when a captain reported discrimination to him.

9. Other primary indicia of supervisory status

The record does not establish that captains have an involvement in transferring, suspending, laying off, or re-

calling employees.

10. Secondary indicia of supervisory status

If captains are supervisors, the Employer employs about nine supervisors and six employees, a ratio of one-and-a-half supervisors to one employee. If captains are not supervisors, the Employer employs three supervisors and about twelve employees, a ratio of one supervisor to four employees. If captains are not supervisors, there would not be any supervisors on the vessels.

Captains attend captains' meetings which vary from a couple times a month to once every 2 or 3 months. The general manager participates in captains' meetings. Scalzo attends captains' meetings about once a month, more or less. At captains' meetings, issues and concerns, including safety, quality, availability of crew members, and managing and recruiting good crew members are discussed. Terminations of deckhands and captains are also discussed.

Kroon testified that captains earn between \$500 and \$700 per day, mates and crew boat captains earn between \$400 to \$500 per day, regular deckhands earn between \$300 and \$400 per day, and seasonal employees earn between \$200 and \$300 per day. Captains and deckhands have the same benefits, including a 401k plan, profit sharing, health insurance, dental insurance, vision insurance, an employee assistance program, a per diem program for out-of-town work, and compensation for training.

Captains are authorized to purchase parts needed for day-to-day maintenance of their vessels, but they cannot purchase more significant parts, such as motors. Butts testified that he generally submits requests for repairs to management, unless something is needed immediately to complete a job. Butts does not know the limit on how much he can spend to purchase a part.

III. ANALYSIS

A. Captains' Supervisory Status

Under Section 9(a) of the Act, a labor organization must be designated or selected by a majority of "employees" in an appropriate unit to become the employees' exclusive collective bargaining representative. Under §2(3) of the Act, individuals employed as supervisors are excluded from the definition of "employee." Section 2(11) of the Act defines a "supervisor" as:

. . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of

such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, the Board will find individuals to be supervisors if:

- (1) they hold the authority to engage in any 1 of the 12 supervisory functions . . . listed in §2(11);
- (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and
- (3) their authority is held “in the interest of the employer.”

Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006), citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

Individuals will be found to possess supervisory authority if they can independently take any of the actions enumerated in Section 2(11), or if they can effectively recommend such actions. *Oakwood Healthcare, Inc.*, 348 NLRB at 687. The Board considers individuals’ authority to recommend actions to be effective if the recommendations are usually followed without independent investigation by a superior. *DirecTV*, 357 NLRB No. 149, slip op. at 3 (2011), citing *Children’s Farm Home*, 324 NLRB 61, 61 (1997).

To establish that a putative supervisor exercises independent judgment in exercising supervisory authority, a party must show that the individual takes or recommends the relevant actions “free of the control of others” and that he or she “form[s] an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare, Inc.*, 348 NLRB at 692–693. The Board will find that an individual has not exercised independent judgment if the relevant actions or recommendations are “dictated or controlled by detailed instructions,” including the employer’s rules and policies. *Id.* at 693.

The burden of proving supervisory status, by a preponderance of the evidence, rests with the party asserting such status. *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Here, that burden rests with the Employer. The Board will not “construe supervisory status too broadly because the employee who is deemed a supervisor is denied the rights which the Act is intended to protect.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1689, *affd.* in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, “purely conclusory” evidence is not sufficient to establish supervisory status, and a party must present evidence that the individual at issue “actually possesses” supervisory authority to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Conflicting or inconclusive evidence concerning particular

indicia of supervisory status will lead to a finding that supervisory status has not been established, at least with respect to those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

It is preliminarily noted that although the Employer cites a number of cases in which the Board found captains of vessels to be supervisors, the Board will not find captains to be supervisors if they do not possess any indicia of supervisory authority. For example, in *McAllister Bros. Inc.*, 278 NLRB 601 (1986), the Board found that tugboat captains were not supervisors because, although they were nominally in charge of their tugboats, they in practice had little authority or need to exercise control over their crews. *Id.* at 610. The captains in that case planned their vessels’ operations, observed conditions, coordinated operations with their mates, and gave mates and deckhands directions, primarily concerning the placement of lines. *Id.* They were also responsible for the personnel and equipment on their vessels under their Coast Guard licenses. *Id.* They maintained constant radio contact with the office and referred personnel problems to management. *Id.* at 601 fn. 3, 610. In sum, they did not possess any indicia of supervisory authority. *Id.* at 610.

Here, the Employer asserts that captains have the authority to hire, promote, discharge, assign, discipline, and responsibly direct employees, and to adjust their grievances. Petitioner contends that captains do not possess any indicia of supervisory status. Each of the indicia of supervisory status, at issue herein, is addressed in turn below.

1. Hire

To establish supervisory status, an individual’s influence on the hiring process must be based on actual “delegated authority to participate in the hiring process” and not merely on respect for the judgment of the person making the recommendation. *Plumbers Local 195*, 237 NLRB 1099, 1102 (1978). In determining whether referring applicants for hire constitutes effective recommendation of hiring within the meaning of Section 2(11), the Board considers the amount of weight the employer gives the referral. *Empress Casino Joliet Corp.*, 204 F.3d 719, 721 (7th Cir. 2000); *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997). Where the weight given to such referrals is not established in the record, evidence concerning the authority to make referrals will be found insufficient to establish supervisory status. *F. A. Bartlett Tree Expert Co.*, 325 NLRB at 245.

Here, Employer policies and some Employer testimony establish the existence of a formal hiring process involving the review of applications, interviews, and management involvement in the process. However, other

Employer testimony indicates that the Employer does not follow its formal policies and, instead, relies on a less informal process utilizing employee referrals in locating candidates for hire. The record reveals that the weight given to captains' referrals and the degree of review of captains' hiring recommendations was contradictory and inconclusive. Specifically, Scalzo testified that captains make final determinations regarding hiring, and Butts testified that captains determine whether applicants are hired or not. However, the record reflects that the Employer conducts some degree of review of captains' recommendations or decisions concerning hiring. Indeed, Scalzo testified that a captain may hire an applicant on the spot, as long as an Employer manager has no reason to object. Yet, he also did not specify the possible grounds for managers' objections or the frequency or regularity with which such objections are made. Butts at one point in his testimony indicated captains may hire on the spot but then he backtracked by testifying that all captain hiring recommendations are submitted to Employer management. Butts' backtracked testimony is more consistent with the Employer's written hiring process/policies.

While the record would indicate that captains may meet with candidates for hire, according to Butts' testimony, the meeting was not truly an interview session as much as it was informational in nature for the prospective hire to meet crew members, and tour or ride on a vessel to observe the crew's work. Assuming, arguendo, the captains interview, participation in the interview process, alone, fails to establish the authority to hire or effectively recommend the same. See *Quality Chemical, Inc.* 324 NLRB 328, at 329 (1997) (mere participation in interviews is insufficient to establish supervisory status: the party alleging supervisory status must show that the purported supervisor participates in the hiring decision.)

Regarding the hire of Captain Richard Murphy, Kroon testified that once the Employer receives a hiring recommendation, because the Employer's operations fall under the close scrutiny and authority of the Coast Guard and other entities, the Employer must perform its due diligence to make sure that all the candidate's documentation is properly in place. Kroon did not elaborate on the nature and extent of this due diligence process or what occurs when the Employer's due diligence reveals that a targeted hire candidate is lacking in material respects. Kroon did not testify that captains play any role in this due diligence process. Further, Kroon's testimony was ambivalent regarding whether he accepted captains' hiring recommendations and whether he conducts an independent investigation of any such recommendations. Specifically, he testified he "takes" the recommendations

and then testified regarding the due diligence that must be performed with captain hires.

As for record testimony that hiring recommendations are made collectively and collaboratively by the captains, the Employer did not present any evidence concerning what, if anything, occurs when the captains' recommendations are less than unanimous with respect to a particular candidate or when captains differ over the best candidate available from a list of applicants. In addition, the Employer did not present evidence establishing the frequency or regularity with which applicants collectively recommended for hire by captains are indeed hired or any documentary evidence to support its position in this regard.

There is no dispute that the Employer has hired a number of captains and deckhands over the past few years and yet all the Employer provided in terms of documentary evidence relating to concrete examples of actual hires was an inconclusive e-mail chain involving one hire and a captain who relayed the job offer and pay to the eventual hire.

In light of the above and the record as a whole, I find that the Employer has failed to meet its burden that captains possess the authority to hire or to effectively recommend the same.

2. Promote

Captain Butts was the only witness to testify regarding the captains' purported authority to promote deckhands. Specifically, Butts testified that he could elevate a deckhand to mate status even though there is no official title or position in existence for a mate in the Employer's operations. Moreover, the Employer did not produce testimony or documents establishing whether a mate's duties and responsibilities are largely distinguishable from that of a deckhand. Certainly, the Employer maintains no job description or formal job/title classification for the mate position.

Butts testified that becoming a mate is similar to becoming a captain in training rather than effectively a promotion. Indeed, he testified that he did not know if being selected for such training changed a deckhand's job title or resulted in an increase in pay. Although Kroon testified that mates have a higher pay range than regular deckhands, the record does not reflect whether mates' pay is actually linked in any way to their selection by captains for training. Further, the record does not reveal who decides when a deckhand's pay should be increased, or whether the Employer conducts any review relating to a deckhand receiving a pay rate within the pay range for mates. However, it is clear from Captain Butts' testimony that he is not involved in the decision as to when and how much a deckhand's pay will increase due

to becoming a captain in training.

Aside from stating that deckhands are selected as mates based on their certifications and job performance, Butts' testimony also did not elaborate on what factors captains consider in gauging whether a deckhand's job performance warrants his or her selection to be a mate. I am, therefore, unable to find that captains exercise independent judgment in selecting deckhands to serve as mates. Moreover, the record reveals insufficient evidence to establish a clear link between a captain selecting a deckhand for mate or captain in training status and any immediate impact on the selected deckhand's job tenure or status.

In view of the above and the record as a whole, I find that the Employer has failed to carry its burden of establishing that captains possess the authority to promote employees or to effectively recommend the same within the meaning of Section 2(11) of the Act.

3. Discharge

Although there was testimony about captains' ability to discharge employees without consulting with the general manager, the Employer provided few examples of when such action would be deemed appropriate. In this regard, Scalzo indicated that captains may discharge employees if it is "absolutely necessary" and if the circumstances warrant it, and then went on to explain that the Employer did not want the crew, the vessel, or the cargo to be compromised. Scalzo later indicated that captains would usually consult with the general manager before discharging an employee "unless it's...immediate and/or a succession of issues that have cause[d] it." Scalzo did not further elaborate on the circumstances when a captain's discharging an employee without consulting with the general manager was inappropriate. Captain Butts gave only one example of such a circumstance, which was when a deckhand is insubordinate. The Employer did not present any evidence that any employee has ever been discharged by a captain without consulting with the general manager, for insubordination or for any other reason. In any event, insubordination is a type of conduct that is so egregious that the discharge of employees for insubordination requires little independent judgment. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

Kroon provided three examples of employees allegedly discharged by captains, but those examples are insufficient to establish that captains independently discharge employees or effectively recommend such action.

In his testimony about the discharge of Captain Daniel Wright, Kroon began by saying that *he* concluded that Wright should be discharged after Wright went underneath a dock damaging a tug, a barge, and the dock. Kroon then testified that, previously, he had "lots of dis-

cussions" with the captains about Wright's performance and "personality issues" before the incident precipitating Kroon concluding Wright should be discharged. Kroon further testified that he and the captains wanted to discharge Wright before the incident, but that "it was discussed with the captains" that the Employer did not have someone to fill Wright's position if he were discharged before the end of the season, and "it was discussed and decided" that the Employer would keep Wright until the end of the season. In response to leading questions, Kroon later stated that the captains decided to let Wright stay and that he "went along with that decision." In any event, Kroon's numerous discussions with the captains to retain Wright through the end of the season, appeared to have been prompted by Kroon telling the captains that the Employer had no one to fill Wright's position and that his workload would fall on the remaining captains. Thus, notwithstanding Kroon's response to a leading question from Employer counsel, the captains appear to have been left with no option but to retain Wright, at that juncture, until the end of the season. This action by the captains hardly rises to the level of independent judgment required under Board law, as required for the exercise of supervisory authority, or rises to the level of meeting the Employer's burden of showing the captains exercised independent judgment in the circumstances surrounding Wright's situation. Instead, it appears that the captains had repeatedly complained about Wright, and that Kroon admittedly regretted waiting until after Wright's vessel accident to decide to terminate him. Thus, prior to the accident, it appears that Kroon rejected the captains' apparent call to discharge Wright.

As for Kroon's testimony about the discharge of Shawn Van Deusen following his failure to secure an ice wire, thereby causing damage to the Employer's facility, Kroon indicated that captains and deckhands complained about Van Deusen not helping after the incident. Again, in response to leading questions, Kroon first said that the captains, and not the deckhands, decided to discharge Van Deusen based on the complaints and their observations of Van Deusen's conduct, which had been discussed with Kroon. Kroon then testified that he "accept[ed] their recommendation to terminate." While Kroon's testimony indicates that the captains recommended Van Deusen's discharge, it is insufficient to establish that their recommendations were effective recommendations within the meaning of Section 2(11). Again, Kroon's extensive involvement in "lots of discussions" with the Employer's employees regarding their observations of and complaints about Van Deusen's performance prior to his discharge, suggests that Kroon approved the decision to discharge Van Deusen based on

the reports he had received from the captains and/or deckhands. Thus, it was largely Kroon who appears to have conducted the investigation into whether Van Deusen's conduct warranted discharge. It does not appear that the Employer charged the captains with the duty to investigate Van Deusen's conduct as much as it appears that the captains were witnesses to that conduct and reported their observations to Kroon through the course of numerous discussions about the matter. Indeed, it appears that if the captains had it their way, Van Deusen would have been discharged earlier than when the decision was ultimately reached.

Kroon's testimony about the discharge of the deckhand in Seward for failing to complete the Employer's EAP was not sufficiently detailed to reflect who recommended or decided that the employee should be discharged. Indeed, it may have very well been the mere fact that the deckhand failed/refused to complete the EAP that prompted the discharge. When asked if Captain Pat Noland terminated the employee, Kroon replied, "Yes, I believe so." Kroon did not further elaborate on any discussions between Noland and management about the employee's discharge. It is not clear in the record whether Noland merely relayed the decision to discharge to the deckhand or whether Noland, alone, made that decision with no independent investigation by the Employer and without any prior consultation with Employer management.

While the testimony about the discharges of Captains Daniel Wright and Shawn Van Deusen reflect that captains have recommended captains' discharges, the Employer did not present evidence establishing the frequency or regularity with which captains' recommendations of discharge are followed by the Employer and the Employer failed to show that captains' recommendations regarding discharge are carried out with no independent investigation by any other Employer official. Moreover, I note that Kroon testified that he has been "through hundreds of employees" during his employment with the Employer and yet, the Employer failed to produce any documents relating to the actual discharge of any employees, with the exception of an isolated captain's e-mail about relaying a discharge decision to an employee because of Kroon's vacation schedule and the Employer's need to implement the discharge action.

Based on the foregoing and the record as a whole, I find that the Employer has failed to meet its burden of showing that captains possess the authority to discharge or to effectively recommend the same.

4. Assign

The Board has defined "assignment" as "the act of designating an employee to a place, such as a location, de-

partment, or wing; appointing an employee to a time, such as a shift or an overtime period; or giving significant overall duties to an employee. *Brusco Tug & Barge, Inc.*, 359 NLRB No. 43 at slip op. at 5, citing *Oakwood Healthcare*, 348 NLRB at 689. The Board has found that the "ad hoc instruction that an employee perform a discrete task" is not the type of "designation of overall duties" that constitutes an assignment. *Id.* The Board further noted that "[a] mate overseeing a crew that includes more than one deckhand or engineer must exercise greater discretion in deciding which deckhand to choose in a given situation or which engineer to call on in the case of an engine failure." *Id.* at slip op. at 9.

In *Brusco Tug and Barge, Inc.*, for example, the Board found mates' instructions concerning towing and docking did not constitute assignments because they amounted to no more than "ad hoc instructions that the employee perform a discrete task. *Id.* The Board explained that mates did not designate deckhands to participate in overall duties, such as making up a tow or docking, but that such activities were part of all crew members' pre-assigned job duties. *Id.* The Board found that directing deckhands "where to stand, on which side of the vessel to place the lines, what lines to release and in which order, and which tools to use" amounted to "ad hoc assignments that do not rise to the level of supervision." *Id.*

In contrast, in *American River Transportation Co.*, cited by the Employer, the Board found that pilots on towboats with crews of nine to ten individuals had the authority to assign, where the pilots used independent judgment during the course of navigation to order particular crew members to perform particular tasks such as standing lookout, repairing lights, cleaning windows, and fixing the depth finders. 347 NLRB 925, 927 (2006). However, the Board has held that proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. See *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985); *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002).

Here, the record reveals that the operations manager, and not the captains, is responsible for assigning particular vessels to particular jobs and that the Employer currently employs just six deckhands, one for each captain currently employed by the Employer. Each captain is generally assigned one deckhand to a vessel. While there

is some evidence that captains select deckhands to work on their vessels, the Employer did not present evidence concerning what specific factors are considered by captains in selecting deckhands, aside from presenting very general evidence that captains will only select deckhands capable of performing their jobs. In those instances when a captain needs more than one deckhand, it appears, when a deckhand cannot be borrowed from another vessel, that the captain must present that need to Employer management for consideration or action and that management has a very small pool of deckhands from which to consider providing an additional deckhand. As for work schedules, the record reveals that deckhands generally are able to discern their schedule in view of the Employer's established practice that captains and deckhands normally work a week on followed by a week off. Under these circumstances, the record does not disclose a basis to find that the captains assign within the meaning of the Board's decision in *Oakwood*. Assuming, arguendo, the captains do possess the authority to assign or recommend such action, the record reveals insufficient evidence to establish that captains exercise independent judgment in selecting deckhands to work on their vessels.

In arguing that captains have the authority to assign employees, the Employer cites Captain Butts' testimony that he directs his crew regarding when to bring in the winch, on how much tow wire to use in towing something in shallow water, to make sure all hatches are closed, to have things on standby for certain towing jobs, or to be in the engine room if there is a problem with an engine. Although Butts testified that he plays to his deckhands' strengths in deciding who will perform what task, he, unlike the pilots in *American River Transportation Co.*, generally works with only one deckhand on his vessel. Further, the instant record only contains hypothetical examples of captains working with more than one deckhand rather than any concrete examples of how any particular additional deckhand was actually selected to work with Butts or any other captain, or how that selection process worked relative to the Employer's deckhand needs elsewhere or relative to the one week on and one week off schedule. Such accounts for Butts testimony that he submits his needs for more than one deckhand to Employer management. Moreover, Butts testified that when his vessel is underway, he is in the wheelhouse navigating, so it requires little independent judgment for him to determine that his deckhand should be assigned to complete any task outside the wheelhouse that needs to be completed while the vessel is underway. The Employer also did not establish that captains exercise independent judgment in determining who will perform what

tasks when captains and their deckhand(s) are completing maintenance work while their vessels are not underway. Further, the record does not disclose why a vessel at bay would require more than one deckhand in view of any Employer operational needs elsewhere.

In sum, the record reveals insufficient evidence to meet the Employer's burden of showing that the captains possess the authority to assign or effectively to recommend the same within the meaning of the Act. Rather, the record reveals that the captains' assignment of deckhands to perform particular tasks amounts to the type of "ad hoc instructions" that the Board in *Brusco Tug and Barge, Inc.*, supra, found did not constitute supervisory authority to assign.

5. Reward

The Employer did not take the position in its brief that captains have the authority to reward employees. However, I find it necessary to address the issue because the Employer presented evidence concerning captains' involvement in determining employees' pay and granting employees short periods of time off.

With respect to the captains' purported involvement in determining employees' pay, Scalzo testified that employees' initial pay rates are set by captains or by the general manager and the operations manager, with the recommendation of the captains. Notwithstanding such conclusory evidence, Butts contradicted Scalzo when the former testified that he does not have the authority to set deckhands' pay rates. Further, although Kroon testified that he had solicited captains to provide input concerning employees' pay rates in 2012, he admitted that he made the final determination concerning changes to employee pay rates and that he did not accept all of the written recommendations submitted to him by Captain Mark Theriault in response to Kroon's captain-wide solicitation for input on pay raises. In sum, the record does not establish that captains possess the authority to change or set employees' pay rates or effectively to recommend such action.

With respect to captains' involvement in granting employees short periods of time off, the record reflects that the captains' role is ministerial in nature and consists of helping a deckhand find coverage from other deckhands when they need short periods of time off. I find that captains' facilitating that process does not require the exercise of independent judgment. Indeed, the record reveals that the Employer's practice is for employees in the petitioned-for unit to work out among themselves any needed changes to their respective work schedules.

In light of the above and the record as a whole, I find that the captains do not possess the authority to reward or to effectively recommend the same as defined in Section

2(11) of the Act.

6. Discipline

The Board has found that when an individual has the authority to initiate the disciplinary process, even when discipline must be reviewed or approved by a supervisor before issuance, the individual has authority to exercise independent judgment in effectively recommending discipline. *Sheraton Universal Hotel, Mountaineer Park*, and *Progressive Transportation Services*, supra. Thus, verbal warnings constitute discipline within the meaning of Section 2(11) if they form a foundation for future disciplinary action. *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007). However, even when it has been established that an individual initiates the disciplinary process, the Board will decline to find that the individual is a supervisor if the party asserting supervisory status fails to introduce evidence of the extent and nature of the review process undertaken in determining whether discipline should actually issue. *DirecTV*, 357 NLRB No. 149, slip op. at 3–4 (2011).

Here, although there was general testimony that captains may discipline employees on the captains' respective vessels, the Employer did not present evidence of any captain issuing any discipline to an employee other than a verbal warning. I find that there is insufficient evidence to establish that by verbally warning employees, captains actually initiate the disciplinary process, and that this case is, thus, distinguishable from *Sheraton Universal Hotel*, 350 NLRB 1114, 1115–1118 (2007); *Mountaineer Park*, 343 NLRB 1473 (2004); *Progressive Transportation Services*, 340 NLRB 1044, 1045–1046 (2003). Employer witness testimony given about verbal warnings suggests that verbal warnings are very informal and are difficult to distinguish from simple instructions or guidance on how to do something. Moreover, General Manager Kroon testified that the Employer probably does not maintain any record of verbal warnings, although the Employer's employee handbook requires that oral warnings be documented for future reference. Further, Kroon essentially admitted that discipline is "pretty informal" and that often captains just tell their deckhands they are not performing their duties. In short, the record does not reflect that an employee's receiving any specified number of verbal warnings will lead to disciplinary action.

Further, with respect to the first of three examples the Employer provided concerning the issuance of verbal warnings, Kroon described the issuance of a verbal warning to Captain Shawn Van Deusen in November 2011. Kroon further testified that he "talked to" Captain Mark Theriault before the warning was issued and that Kroon "authorized" the issuance of the warning. He said that he

and Theriault discussed the issue and felt it was appropriate. Kroon's discussing Van Deusen's conduct with Theriault and authorizing the issuance of the warning suggests that Theriault did not independently decide to issue the warning.

Regarding the second example, Kroon testified that in 2008, a captain, he believed to be named Dan, presumably Captain Daniel Butts, verbally warned a deckhand for failing to clean the boats between trade outs without first consulting with management and that the warning was "discussed...after the fact..." However, Kroon's testimony did not reveal how the deckhand was warned (e.g., orally or was anything documented in the Employer's records/files), whether there were any subsequent discussions of the warning (e.g., was the employee notified the warning was being documented and/or that it could have an impact on his job tenure or status, or did Dan and Kroon discuss the warning further). Moreover, Butts did not testify about the warning apparently issued by him. The record also reveals that this warning was issued in 2008, before Foss acquired the Employer's business, and the Employer did not present any evidence concerning whether and to what extent its disciplinary policies or captains' authority changed following the acquisition.

As for the third example, Kroon testified about a deckhand in Seward being told that he needed to participate in the Employer's EAP because he was unable to report to work twice when called because he had been drinking. However, Kroon did not specify who decided the employee needed to participate in the EAP, who told the deckhand he would need to participate, whether the requirement was discussed with or authorized by management, or whether the conversation with the deckhand was considered a verbal warning, was otherwise disciplinary, or was documented in the Employer's files/records. See *Oak Park Nursing Care Center*, 351 NLRB at 28 (verbal warnings only constitute discipline within the meaning of Section 2(11) if they form a foundation for future disciplinary action).

In view of the above, I find that the Employer's witnesses' general statements that captains discipline employees constitute conclusory evidence insufficient to establish supervisory status. I further find that the Employer's specific examples of the issuance of verbal warnings are insufficient to establish that captains independently issue discipline or effectively recommend such action, or that any such exercise of disciplinary authority actually affected any employee's job tenure or status. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, at 1139 (1999). Here, again, it is worth noting that the Employer provided no disciplinary documents, aside from

an isolated e-mail regarding one discharge, showing actual discipline of any particular employee and with any real consequence under either the Employer's formal disciplinary policies or under its de facto process. Such a lack of documentary evidence is damaging to the Employer's contention in view of General Manager Kroon's testimony that he has been "through hundreds of employees" while working for the Employer.

I find based on the above and the record as a whole that the Employer has failed to meet its burden of establishing that the Employer's captains possess the authority to discipline or to effectively recommend discipline.

7. Responsibly direct

The Board has found that if an individual decides "what job shall be undertaken next or who shall do it," he or she is a supervisor, if such direction is responsible, meaning that the individual will be held accountable for the task's performance, and if the individual exercises independent judgment in giving the direction. *Brusco Tug and Barge*, 359 NLRB No. 43, slip op. at 7, citing *Oakwood Healthcare*, 348 NLRB at 691-692.

To show that an individual is accountable for a task's performance, a party must show that the individual could suffer adverse consequences if the task is not performed. *Id.* In *Brusco Tug and Barge, Inc.*, in applying these standards, the Board found that "conclusory assertions" about mates' accountability for deckhands' work, such as testimony to the effect that mates were "ultimately responsible" or that mates are "accountable under federal law for the actions of their crew" were too conclusory to establish supervisory status. *Id.* at slip op. at 8. There, the Board stated that the party asserting supervisory status failed to "delineate...for what or how the mates are actually held accountable." *Id.*

To show that directing employees to perform particular tasks requires the exercise of independent judgment, a party must show that the direction is more than a routine or clerical "ad hoc instruction that the employee perform a discrete task." *Id.* The Board has also determined that the authority to direct the work of employees is not indicative of supervisory status, if it is based on greater technical expertise and experience, rather than actual supervisory authority. *Chevron Shipping Co.*, 317 NLRB at 382. Moreover, the Board has found that "the size and complexity of the machinery and the potential dangers in operating it, are not per se marks of statutory supervisory authority." *Id.*

Here, the record reveals that captains direct deckhands to perform particular tasks on their vessels. Moreover, all of the Employer's witnesses stated that captains could be held accountable for deckhands' errors, through discipline or discharge. However, the witnesses did not spec-

ify what types of errors by deckhands would result in what levels of discipline for their captains. Further, the Employer did not produce any written policy stating that a captain could be disciplined for the error or performance of a deckhand. When Captain Butts was asked to explain how he knew he would be held accountable, he did not identify any particular policy or instruction from the Employer, but instead stated that it was the "essence of being a captain" and that it was a Coast Guard requirement. However, no such requirement was introduced into the record. Further, the Employer did not provide any concrete examples of instances in which a deckhand's error or performance led to adverse consequences for his or her captain. Indeed, the Employer provided no evaluations or disciplinary actions showing captains being held accountable for the performance of their crew. The one example of captains receiving a bonus in 2011 for their performance of preventing damage to the Employer's facility fails to establish that the captains were rewarded with the bonus in part or in whole because of the deckhands' performance.

I further find that there is insufficient evidence to establish that captains' direction of deckhands requires independent judgment. While operating a vessel in the conditions of Cook Inlet undoubtedly requires technical expertise, the Employer did not introduce evidence establishing that the directions given to deckhands are anything more than routine *ad hoc* instructions. Further, though captains are required to follow Coast Guard regulations while operating their vessels, the Employer did not introduce all relevant Coast Guard regulations, so that the nature and extent to which captains are constrained by those regulations in giving their directions may be assessed. Further, the captains are normally assigned one deckhand, and while the captain is operating the vessel, there is but one other individual to whom the tasks may be assigned, which further removes the need for any independent judgment in the normal course of events.

On the basis of the foregoing and the record as a whole, I find that the Employer has not met its burden of establishing that captains responsibly direct employees or effectively recommend such action.

8. Adjust grievances

The Employer asserts that captains' obligations to report complaints of harassment and discrimination under the harassment and discrimination policies in the Employer's employee handbook and their ability to address certain types of complaints from deckhands establish that captains have the authority to adjust grievances under Section 2(11). Petitioner did not specifically address the captains' alleged authority to adjust grievances in its

brief.

Although the Employer's harassment and discrimination policy requires captains to report complaints of harassment and discrimination, it does not state that captains have anything more than a reporting role. Although Kroon testified that captains could perform an investigatory function, he admitted that no captain has ever done so. Further, there is no evidence establishing that a captain could actually decide how to address or remedy harassment or discrimination.

Further, while there was testimony that captains can resolve conflicts between crew members or respond to employee complaints about certain working conditions, such as the smell of a room on a vessel, the Employer did not adduce any evidence establishing how the exercise of such authority would require independent judgment. Moreover, the Employer offered no documents showing a captain adjusting any employee's grievance.

In light of the above and the record as a whole, I find that the Employer has failed to meet its burden of showing that captains possess the authority to adjust grievances or to effectively recommend such adjustment.

9. Other primary indicia of supervisory status

Because the record does not reveal that the captains' authority involves transferring, suspending, laying off, or recalling employees, the Employer cannot establish supervisory status on the basis of any of these indicia.

10. Secondary indicia of supervisory status

The Board may use non-statutory indicia, including the ratio of supervisors to employees, the presence of other supervisors on-site, differences in terms and conditions of employment, and attendance at management meetings, as background evidence in resolving supervisory issues. *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000); *Ken-Crest Services*, 335 NLRB 777 (2001); *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). In *Brusco Tug & Barge, Inc.*, for example, the Board noted that the fact that if mates were found to be supervisors, there would be a ratio of one supervisor to each employee aboard a vessel, weighed against a finding of supervisory status. *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43 at slip op. at 9.

Here, the ratio of supervisors to employees militates against a finding of supervisory status, if captains are found to be supervisors. Specifically, if captains are found to be supervisors, the ratio of supervisors to employees on a vessel would typically be one to one, and the overall ratio of supervisors to employees in the Employer's operations would be approximately one and a half to one. On the other hand, if captains are not found

to be supervisors, then there is no supervisor on the vessels while they are in operation, though this lack of a supervisor is somewhat undercut by the fact that captains and deckhands have means of communicating with management from the vessels. Moreover, nothing in the statutory definition of "supervisor" suggests that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor. See *VIP Health Services v. NLRB*, 164 F.3d 644, 649-650 (D.C. Cir. 1999) (if an employee "do[es] not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it"); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Washington Post Co.*, 254 NLRB 168, 204 (1981); cf. *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (where a statutory supervisor is available by telephone or pager, "the highest ranking on-site employee will not invariably be considered a supervisor"); *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994), cert. denied 514 U.S. 1015 (1995); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986); *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918 (6th Cir. 1991) (highest ranking employee on the premises does not ipso facto make them supervisors, citing *NLRB v. Res-Care*, supra); see also *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000) ("we grant that the idea of a completely unsupervised vessel is, although implausible, not completely preposterous" (citations omitted)).

While I recognize that the Employer's arguments regarding the lack of a supervisor on a vessel and captains' higher rates of pay and attendance at captains' meeting weigh in favor of a finding of supervisory status, evidence must still be presented that supports a finding that an individual possesses one or more of the primary indicia set forth in Section 2(11). See *Training School of Vineland*, 332 NLRB 1412 (2000). Here, however, I find that the Employer has not presented sufficient evidence to establish that captains possess any of the primary indicia set forth in Section 2(11) of the Act. Therefore, the Employer's secondary indicia arguments do not suffice to meet the Employer's burden of showing that captains are supervisors within the meaning of the Act.

IV. CONCLUSION

In light of the above and the record as a whole, I find that captains do not possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act and, therefore, are appropriately included in the petitioned-for unit. Accordingly, I shall direct an election in

the following appropriate unit (the Unit):

All full-time and regular part-time captains and deckhands, including mates and captains in training, employed by the Employer at or out of its Anchorage and Seward, Alaska locations; excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.⁶

There are approximately 12 employees in the Unit found appropriate.

. . . .

⁶ The unit found appropriate conforms substantially with the unit Petitioner sought in its petition.